RECORD, CASE No. 13,992.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 321.

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

JAMES M. WATERWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1893.

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1 UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the court-house, in the city of Baltimore, on the first Monday of April, being the first day of the same month, in the year of our Lord one thousand eight hundred and eighty-nine—present, the Honorable Thomas J. Morris, judge Maryland district; Thomas G. Hayes, Esquire, attorney; George H. Cairnes, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

THOMAS C. CHAPPELL }
vs.
JAMES W. WATERWORTH. }

Cause removed from the circuit court for Anne Arundel county.
In ejectment.

Record. Filed 9th February, 1888.

STATE OF MARYLAND, } *sct:*
Anne Arundel County, }

At a circuit court of the fifth judicial circuit of the State of Maryland, begun and held at the city of Annapolis, on the third Monday of January, being the sixteenth day of the same month, in
2 the year of our Lord one thousand eight hundred and eighty-eight—present, the Honorable Oliver Miller, chief judge; J. Thomas Jones, John E. Smith, asso. judges; John G. Crane, Esq., sheriff; Sprigg Harwood, clerk—in the record and proceedings of the same court, among others is the following, to wit:

THOMAS C. CHAPPELL }
vs.
JAMES W. WATERWORTH. }

Be it remembered that heretofore, to wit, on the twenty-third day of December, in the year of our Lord one thousand eight hundred and eighty-seven, the said plaintiff, by Francis P. Stevens, Esquire, his attorney, declared against the said defendant in manner and form following, to wit:

In the Circuit Court of Anne Arundel County.

ANNE ARUNDEL COUNTY, *To wit:*

Thomas C. Chappell, by Francis P. Stevens, his attorney, sues James W. Waterworth, for that whereas the said Thomas C.
3 Chappell heretofore, to wit, on the first day of January, in the year eighteen hundred and seventy-eight, was in possession of all that parcel of land situate, lying, and being in Anne

Arundel county, and contained within the metes and bounds, courses and distances, following—that is to say:

Beginning for the same at the site of Hawkins Point light-house, situated on the west side of the Patapsco river, in Anne Arundel county, Maryland, and containing about five acres, situated and lying within a circle whose centre is distant about one-eighth of a nautical mile in a southeasterly direction from Hawkins point and bearing southwest by west three-fourths of a nautical mile from Fort Carroll, in the Patapsco river, and which, according to the coast survey chart of 1872, is in latitude thirty-nine degrees twelve minutes and twenty-one seconds north and longitude seventy-six degrees thirty-one minutes and thirty-six seconds west, and whose circumference or boundary line is about two hundred and sixty-three and three-tenths feet from the centre in every direction, and the lands appurtenant thereto, being a strip of land extending from said Hawkins Point light-house to the Brewerton channel, in the Patapsco river, the direction of the centre line of said strip of land from said Brewerton channel to said Hawkins Point light-house being, according to the coast survey chart of 1886, north sixty-four degrees thirty minutes west, and the width thereof be- three hundred feet on each side of said center line.

4 And the said James W. Waterworth did, on the first day of January, in the year one thousand eight hundred and *and* seventy-eight, at Anne Arundel county aforesaid, wrongfully enter said parcel of land and eject him, the said plaintiff, therefrom, and the said defendant ever since has retained and still retains possession of the said lot or parcel of land, and other wrongs to the said Thomas C. Chappell then and there did, to his great damage; and the said Thomas C. Chappell claims the recovery of the said parcel of land, and for his damages $33,333.33⅓.

FRANCIS P. STEVENS,
Attorney for Plaintiff.

To James W. Waterworth, the defendant:

Take notice that an action of ejectment hath been commenced against you in the superior court of Baltimore city by the above-named plaintiff by filing the declaration aforesaid, and that you are required to appear in the said court, in person or by attorney, on the third Monday of January, 1888, to make defense to said action according to law; otherwise judgment will be recovered against you for the premises described in said declaration and you will be turned out of possession.

FRANCIS P. STEVENS,
Attorney for Plaintiff.

A copy of which said declaration was made and delivered to the said sheriff, to be served on the said defendant with notice of suit.

5 And now here, at this day, to wit, on the third Monday of January, being the sixteenth day of the same month, and being the day of the return of the said copy of declaration—Come again into the said court here the said plaintiff, by his at-

torneys, Francis P. Stevens and Frank H. Stockett, Esquires, and the sheriff of the county aforesaid, to wit, John G. Crane, gentlemen to whom the said copy of declaration was delivered, and made return thereof to the court here thus endorsed, to wit:

"Served on defendant, with notice of suit.

J. G. CRANE, *Sheriff.*"

And thereupon, on motion of the said plaintiff, by his attorneys aforesaid, it is ruled by the court here that the said defendant answer the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment will be rendered against him in default thereof.

And the said defendant, on the first day of February, in the year aforesaid, filed in court here the following order, to wit:

In the Circuit Court for Anne Arundel County.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Mr. Howard, clerk, &c.:

Please enter my appearance for the defendant in the above-entitled cause.

THOMAS G. HAYES,
Att'y for Defendant.

6 And afterwards, to wit, on the sixth day of February, 1888, the said defendant, by his attorney aforesaid, filed in court here the following petition, to wit:

In the Circuit Court for Anne Arundel County.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

To the Honorable Oliver Miller, John E. Smith, and J. Thomas Jones, judges of the said court:

The petition of James M. Waterworth, by mistake named James W. Waterworth in the declaration in this cause, respectfully represents to this honorable court that your petitioner at the time of the commencement of this suit was and still is a citizen of the State of Maryland; that the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars; that it is a suit of a civil nature and common law, and arises under the Constitution of the United States in the following manner—that is to say:

The title to the *locus in quo* described in the declaration in this suit, with the right of possession, is averred by this defendant to be now and to have been at the commencement of said suit in the United States of America. The said title of the United States, with the right of possession aforesaid, is derived as follows: The *locus in quo* aforesaid is now and ever has been submerged

land situated in the Patapsco river, in the State of Mary-
7 land, the said river being one of the public waters and navigable rivers of the said United States, and it is now and has been ever since in possession of the United States, used by the United States as a site for Hawkins Point light-house, the same being a light-house of the United States, used as an aid to the navigation of the said Patapsco river. The said defendant is in possession of said site, being the land described in the said declaration, by appointment of the proper executive authority of the United States for and on behalf of the United States as the keeper of the said light-house. The said defendant for his defense to this action relies upon the paramount right and title of the United States, given and conferred by the Constitution of the United States, to the use of the said submerged land in the said river for the purposes of a site for said light-house, the same being necessary and used as an aid to the navigation of the Patapsco river, and which right and title of the United States to the said *locus in quo* for the uses and purposes aforesaid he will claim in his said defense is by virtue of the said Constitution and its provisions paramount to the right or title of the State of Maryland or the said plaintiff, and in support of his right of possession of said *locus in quo* as the keeper aforesaid of said light-house for and on behalf of the United States and in defense of the title of the United States to the same he relies upon — 1, section 8, of the said Constitution of the United States, which is in the following words: "To regulate commerce with foreign nations and
8 among the several States and with the Indian tribes."

Your petitioner makes and files herewith a bond, with good and sufficient surety, for his entering into the circuit court of the United States for the district of Maryland, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of Maryland.

THOMAS G. HAYES,
Attorney for Petitioner.

JAS. M. WATERWORTH.

UNITED STATES OF AMERICA, *District of Maryland*, } *To wit:*

James M. Waterworth, being duly sworn, deposes and says that he is the petitioner named in the above petition, and that he has heard the same read and knows the contents thereof, and that the same is true.

JAS. M. WATERWORTH.

Subscribed and sworn to before me this the 1st day of February, A. D. 1888.

R. LYON ROGERS,
U. S. Commissioner.

9 On the aforegoing petition and affidavit it is ordered by the court this the 6th day of February, A. D. 1888, that the record in the above-entitled cause be, and is hereby, removed to the circuit court of the United States for the district of Maryland, as prayed in said petition, the bond referred to in said petition and filed in said cause having been by the court approved.

OLIVER MILLER.

Bond Referred to in the Foregoing Petition.

"Know all men by these presents that James M. Waterworth, who by mistake is named James W. Waterworth in the declaration in this case, as principal, and Thomas G. Hayes, as surety, are held and firmly bound unto Thomas C. Chappell in the penal sum of three hundred dollars; for the payment whereof, well and truly to be made unto the said Thomas C. Chappell, his heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said James M. Waterworth having petitioned the circuit court for Anne Arundel county, State of Maryland, for the removal of a certain cause therein pending, wherein Thomas C. Chappell is plaintiff and James M. Waterworth is defendant, to the circuit court of the United States for the district of Maryland:

Now, if the said James M. Waterworth, your petitioner,
10 shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court will hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this the 1st day of February, A. D. 1888.

JAS. M. WATERWORTH. [SEAL.]
THOMAS G. HAYES. [SEAL.]

Witness:
R. L. ROSS.

UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

I, Thomas G. Hayes, of Baltimore city, State of Maryland, the surety named in the foregoing bond, do make oath on the Holy Evangely of Almighty God, that I am worth in real property unincumbered and over and above all my debts and liabilities the sum of three hundred dollars.

THOMAS G. HAYES.

Subscribed and sworn to before me by Thomas G. Hayes this the 4th day of February, A. D. 1888.

R. LYON ROGERS,
U. S. Commissioner.

11 On the back of said bond was endorsed, to wit: Approved Feb. 6th, 1888. Oliver Miller, judge circuit court for Anne Arundel county, State of Maryland. And the same is transmitted accordingly. Test: Sprigg Harwood, cl'k.

STATE OF MARYLAND, *Anne Arundel County,* } *sct:*

I hereby certify that the aforegoing transcript is a full and true record of the proceedings in the within-entitled cause.

In testimony whereof I have hereunto set my hand and [L. S.] affixed the seal of the circuit court for Anne Arundel county, this seventh day of February, anno Domini 1888.

SPRIGG HARWOOD, *Clerk.*

Plaintiff's cost, $7.35; defendant's cost, $10.65, including record.

12 *Pleas. Filed* 28 *Feb.*, 1888.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL *vs.* JAMES M. WATERWORTH. } Action of Ejectment.

The defendant in this action, by Thomas G. Hayes, his attorney, for pleas to said declaration says:

1. That he is not guilty of the wrongs alleged in the plaintiff's declaration, and of this he put- himself upon the country.

2. And for a second plea the defendant says that the land described in the declaration is now and ever has been submerged land, which is now and ever has been a part of the bottom of the Patapsco river, the same being a navigable river of the United States within the territorial limits of the State of Maryland, and that said land ever since the year of our Lord eighteen hundred and sixty-eight has been in the possession of the United States as a site for one of its light-houses, known as Hawkins Point light-house, the same being one of the range lights of the Brewerton channel of the said Patapsco river, the said light-house having been erected in the center of said land in the year aforesaid, as an aid to the navigation of said river, by the light-house board of the United States, under and by virtue of the authority and direction of the Congress of the United States as expressed in an act known as the act 28 July, 1866, 14 volume, Statute- at Large, page 313, and that on the 20th

13 day of February, A. D. 1877, the State of Maryland, by a deed duly executed, conveyed, and ceded to the United States respectively the title and jurisdiction over said land. The defendant further says that he is now and has been since the year A. D. 1882 the keeper of said light-house, he having been appointed as such by the Secretary of the Treasury of the United States in the year aforesaid; and this the defendant is ready to verify.

THOMAS G. HAYES,
Att'y for Defendant.

To Thomas C. Chappell, plaintiff:

Take notice that upon filing the above pleas a rule will be entered in said cause, in the U. S. circuit court for the district of Maryland, requiring you to reply to the same fifteen days thereafter.

THOMAS G. HAYES,
Att'y for Defendant.

Endorsed: Service of copy admitted this 28th day of February, A. D. 1888. Francis P. Stevens, att'y for pl't'f. Rule replication.

14 *Agreement Extending Time to File Replication. Filed* 12 *March,* 1888.

In the Circuit Court of the United States, in the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Removed from circuit court of Anne Arundel county *ex parte* and without notice to plaintiff.

It is agreed that under the rule "rep." in the above-entitled cause that the time for filing replication be extended to March 25th, 1888—

It being understood that said Chappell reserves all rights he now has to except to the removal of said cause and to the appearance of the district attorney in said cause.

FRANCIS P. STEVENS,
Att'y for Thos. C. Chappell.
THOMAS G. HAYES,
U. S. District Att'y.

March 12th, 1888.

15 *Answer to Petition for Removal and Motion to Remand Case to the Circuit Court for Anne Arundel County.*

EXHIBITS NOS. 1, 2, AND 3 AND PLATS A, B, AND C. Filed 20 March, 1888.

In the Circuit Court of Anne Arundel County, Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Removed to circuit court of the United States for the district of Maryland by petition of defendant and order of circuit court of Anne Arundel county *ex parte* and without notice to plaintiff.

The answer of Thomas C. Chappell, the plaintiff in this cause, says, in answer to the petition of James M. Waterworth, the defendant, that he admits that the said James M. Waterworth is a citizen of the State of Maryland and avers that he, the said Thomas C.

Chappell, is a citizen of the State of Maryland also, and admits it is an action at common law to recover land ("Sharswood Blackstone Commentaries, vol. 1st, book 11, chap. 2, page 17"), a part of which is "covered with water" and all of which is wholly within the bounds of the State of Maryland. He denies, therefore, that this suit arises under article 1st, section 8, of the Constitution of
16 the United States. He denies that the title to the *locus in quo* described in the declaration in this case is now or has been in the United States of America, and denies that all of the property described in said declaration is or ever has been submerged land, and charges that a large portion thereof is part of the dry land, and charges that a large portion thereof is part of the dry land of the grants known as Point Lookout and the additions to Johnson's harbor. He charges that another large portion thereof is improved by a wharf and dock and buildings thereon erected by this plaintiff. He also charges that parties in his employ have walked out to and entered the light-house situated and erected upon the land in said petition described, and that the said light-house is on the shore (as defined in 3 Howard, 212) of the Patapsco river, and is sometimes almost entirely upon dry land; and he charges that the land upon which said light-house is situated and to which it is affixed and a large portion of the land surrounding the same and adjacent thereto and particularly all that portion of said land described in his declaration within the circle therein set forth and the strip contiguous thereto, being a strip three hundred feet wide on each side of the line drawn from said light-house towards the Brewerton channel S. 64 degrees 30 minutes east to the 31 line of the survey known as the addition to Johnson's harbor, a certified copy for the grant of which and the patent thereof, dated July 2nd, 1861, is herewith exhibited, were conveyed to Thomas Chappell by deed of Philip Schaefer and Thomas T. Watson, trustee, re-
17 corded in the land records of Anne Arundel Co., Md., Liber S. H. No. 24, folio 166, and secondly and fourthly described therein, a certified copy of which deed is herewith filed; and the said Thomas Chappell avers that the said property described in his declaration filed in this cause and embraced within the metes and bounds of said conveyance greatly exceeds five acres; that the balance of the property embraced in his declaration consists of the riparian property appertaining to the land conveyed by said deed and granted to said Chappell as a riparian and adjacent property-owner by the acts of the General Assembly of Maryland—see Revised Code, 1878, article 45, sec. 4, and article 16, sec. 38, 39, 40—and that he is the owner of said riparian property in addition to the property embraced within the metes and bounds, courses and distances, of said grants, and that the Attorney General of the United States and the Secretary of the Treasury have admitted the title of said Chappell to the grants of Point Lookout and the addition to Johnson's harbor, in which said land exceeding five acres is embraced in this cause. He denies that the title to the land embraced in the grants aforesaid is or ever has been in the Government of the United States of America. He charges that the United

States of America has no title or jurisdiction over land, whether submerged or not submerged, except in the District of Columbia and places it has purchased, and that this question has been definitely settled beyond dispute. He refers to the case of Pollard's Lessee *vs.* Hagan, 3 Howard, 212. In that case, page 218, the court says: "The seashore and the arms of the
18 sea, like other public property, may be granted by the king to individual proprietors. 2 Dane's Abr., 690, 691." The court further says, page 224: "The municipal authority of State- is complete within their respective borders." It also says, page 225, that, no matter what the law of any other nation may be, "every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it;" and therefore even if the laws of England had been otherwise, the common law of the United States, as interpreted and established by the decisions of the Supreme Court, now govern this case. The court, in this case says, page 216: "If these positions are right, the United States had nothing below high water mark." It further says: "They cannot put their foot in a State to claim jurisdiction without its consent." It further says, page 223: "Within the District of Columbia and the other places purchased and for the purpose above mentioned, the national and municipal powers of government are united in the government of the union, and these are the only cases within the United States in which the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial government." On page 223: "The United States has no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in cases in which it is expressly granted." The conclusion of the court is: First, The shores of navigable waters and the soils
19 under them were not granted by the Constitution to the United States, but were reserved to the States respectively.

Third, Congress had no right to grant a patent for land covered by water, as the land "was not included in the public lands reserved." "The same court held, in case of Barry *vs.* Keokuk, that the bed of a river to high-water mark belonged to the State;" also in McCready *vs.* Virginia, 94 U. S., 394, "The principle has long been settled in this court that each State owns the beds of all tidewaters within its jurisdiction unless they have been granted away." It further says in same case: "If the State in the regulation of its public domain can grant to its own citizen- the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. The said Thomas C. Chappell therefore charges that all of said property embraced in said *narr.* and within said circle therein described and the light-house thereon are embraced within the grants from the State of Maryland for the property now known as Point Lookout and the addition to Johnson's harbor," and that a large portion of the remaining property embraced in said *narr.* beyond said circle is within the grant known as Johnson's harbor, all of said property being now owned by him as

aforesaid, and that he alone is the owner of the title to said property and entitled to the possession thereof, and that if the United States have been in possession of said property since 1868 that they have been unlawfully in possession thereof. He further charges that the
20 occupation of the property beyond said grants interferes with his riparian rights; that the Supreme Court, in Yates *vs.* Milwaukee, 10 Wall., 497, says: "This riparian right is property and is valuable. It is a right of which when once vested the owner can only be deprived in accordance with established laws, and if necessary that it be taken for the public good, upon due compensation;" and court of appeals of Maryland says, in Goodsell *vs.* Lauton, 42 Md., 371: "This is a valuable right which other persons cannot lawfully destroy or interfere with." He admits that the defendant may be a keeper of a light-house and appointed by the Secretary of the Treasury. He charges that the said Secretary of the Treasury, through his agent, John C. Mallory, by direction in a letter dated Nov. 17th, 1887, from the Secretary of the Treasury, has filed a petition in the circuit court of Anne Arundel county admitting the title of said Thomas C. Chappell to a large portion of the submerged land described in this *narr.*, and particularly to that portion upon which the Hawkins Point light-house stands, and asks said court to summon a jury to condemn the same; and said Thomas C. Chappell charges that no light-house was built on said property as provided in the Revised Statutes of the United States, 355 and 4660. He charges that the light-house is much nearer the banks of the Patapsco river than the limit established by the harbor board for building bulkheads into water in that vicinity permits even to parties who hold no patents, and said permission in said case is granted in view of the act of 1862, passed by the General Assembly
21 and contained in the Revised Code of 1878 as aforesaid, and that said board was established by an act of the General Assembly of this State. He charges that the United States of America is no more entitled to seize and occupy his said property for this public purpose than it would to seize and occupy and use it, or any other private property, for the Interstate Commerce Commission on the grounds that it regulates commerce between the several States, foreign nations (viz., Canada and Mexico), and the Indian tribes; that it cannot seize private property for the purpose of aiding vessels more than railroads, the mails, or any other branch of commerce, except by purchasing or condemning it and paying for the same, as it otherwise violates the fifth article, original amendments to the Constitution. He further charges that the paramount right of navigation belongs in no way to the United States Government, but is in the navigator, whoever he may be, and that it is nothing more than the right of road through the channel, as has been fully demonstrated by the act of Congress itself in granting the privilege of erecting the Kill von Kull bridge over a river between States to a private corporation, leaving only a draw or passage-way therein, and by similar acts of the General Assembly of the State of Maryland over the Patapsco, Susquehanna, and Gunpowder rivers in erecting bridges and confining the navigators to the draws therein; and said

Chappell therefore charges that since under the decision of the Supreme Court in case of McCready *vs.* Virginia "the State owns the beds of all tide-water within its bounds, unless they have been granted
22 away," the State can confine and circumscribe the right of navigation; and that since under the decision in the same case the State can grant "the exclusive use of its land covered by water to its own citizens," and since the State of Maryland has so granted the property known as "the addition to Johnson's harbor" to the predecessors in title of said Chappell, and it is now owned by him, he alone is entitled to said land; and he further charges that under the act of the General Assembly of Maryland, 1862, aforesaid the riparian owner alone is entitled to make improvements in the bed- of rivers within this State, and that the United States of America has no more right to seize this property for the site of a light-house in "the regulation of commerce" than it would sites for post offices, custom-houses, and other public buildings, and that it cannot acquire title thereto even when the sites are located under navigable waters, except, as set forth in the 16 Opinion Attorney General, 369 & 370—opinion of July 30th, 1879, approved by Attorney General Garland in his opinion of July 6th, 1886—and upon due compensation, as in Attorney General Garland's opinion set forth, and he charges that the opinion of July 30th, 1879, aforesaid was rendered after a due examination of the law as referred to therein, and the opinion of Attorney General Garland was also rendered after the fullest investigation into both the facts and the law and upon the question of this title being referred to him by the Secretary of the Treasury for disposal, as provided in Revised Statutes, 357, upon the request of the light-house board, and that the said opin-
23 ion when rendered was shown to the counsel of said Chappell by the secretary of the light-house board, by direction of the Secretary of the Treasury, Fairchilds, and that in view thereof said Chappell took no action against said Government, and that the said Government and the said Chappell have treated regarding said property since the rendering of said opinion with the full admission on the part of said Government, through its duly authorized officers, that the title to said property belongs to said Chappell, who, in view thereof, has permitted said Government to use said property since the date of said opinion undisturbed as a tenant at will, at least until December 1st, 1887, to the great benefit of said Government, and that therefore the question of title has been disposed of under Revised Statutes, 357, as aforesaid, and the Government of the United States is therefore estopped from pursuing any inconsistent course by virtue of the authority it has conferred upon its officers under the 18th clause of the 8th section of the 1st article of the Constitution just as much as it would be if the collector of the port, with the fullest information as to the facts and the law, collected duty on importations at a proper percentage; then, after a period of nearly eighteen months, one of his subordinates, or even he himself, changed his mind and attempted to charge duty on the said goods at a different rate, under which circumstances no dealing with the Government officials, when properly done, would be binding or conclusive upon said Government,

which the said Chappell does not believe was the intention of
24 the framers of the Constitution; and said Chappell charges there was no authority whatever in the letter of the Secretary of the Treasury aforesaid, dated Nov. 17th, 1887, to said Mallory to make any such reservation as he has made in his petition regarding the submerged land, and that the same is in direct contravention of the decision of the Supreme Court and the Constitution; and said Chappell charges that if said United States of America have been using said property since 1868, as set forth in the petition of said Waterworth, under oath, that he, said Chappell, would be entitled to eject as in the Arlington case; and he further charges that if said Waterworth is a light-house keeper appointed by the Secretary of the Treasury he is under the department known as the light-house board, of which said Secretary of the Treasury is president *ex officio;* and he charges that said Mallory is also under said light-house board and the superior officer of said Waterworth; and he hereby serves notice upon said Waterworth and his attorney to produce the letter of said Secretary to said Mallory, dated Nov. 17th, 1887, relative to this and other property which he charges is in the possession of said attorney; and he charges that the Attorney General and the Secretary of the Treasury and the light-house board having admitted the title of said Chappell to said property after the fullest examination of both the facts and the law, without any reservation, that their action thereupon is binding and obligatory upon the United States Government and its officers; otherwise the affairs of government would be constantly placed in the posi-
25 tion of the property embraced in this present cause, regarding which two persons, each claiming authority under the Secretary of the Treasury, have filed petitions in the same court in Anne Arundel county, one of whom, purporting to be the authorized agent of the Government, namely, John C. Mallory aforesaid, admits the title of said Chappell, and, with regard to that portion embraced within the grant known as Point Lookout, without reservation, while the other person, upon his affidavit that he is a light-house-keeper, asserts the title to be in the United States of America, notwithstanding the decisions of the Supreme Court that the beds of the rivers "were not included in the public lands reserved," and that the United States of America owns nothing in the beds of the rivers below high-water mark, and notwithstanding the 5th article, original amendment to Constitution, "nor shall private property be taken for public use without just compension," and notwithstanding this cause embraces dry land. The said Thomas C. Chappell does not know upon what theory the said Waterworth swore in his petition that this *locus in quo* is submerged, when his attorney has plats in his possession provided by the light-house board showing that a portion of it is dry land, and that another portion is highly improved by a wharf and buildings thereon; neither does he know upon what authority he claimed the title to be in the United States of America, when the United States of America have filed a petition, through its agent Mallory (authorized under the hand and seal of

the Secretary of the Treasury), in the same court of Anne
26 Arundel county, admitting the title thereto to be in said
Thomas C. Chappell and asking that the same be condemned for public use; neither does he know why he should have sworn that the paramount right and title to submerged land was and is in the United States Government, when the Supreme Court has decided again and again that the United States of America have no title whatever to the submerged land, and there is nothing about submerged land in the Constitution, and since article 1st, sec. 8, thereof confers no title or right to use private property, which doctrine has been fully known since the adoption of the original amendment of the Constitution

If the power to regulate commerce gave the right to the Government to seize any site or building that might be desired or necessary therefor without purchasing or condemning the same there would be no safe or valid title to any private property. The letter of Nov. 17th, 1887, hereinbefore mentioned, under the hand and seal of the Secretary of the Treasury directs the condemnation of the site of Hawkins Point light-house, and also of the land from Thomas' cove across Point Lookout and into the Patapsco river east of Hawkins point, to the deep and navigable waters of said river, so as to acquire the title for the use and benefit of the United States for the purpose of using the same for an unobstructed view of the Range lights of the Brewerton channel and describes the property further by metes and bounds and is an order to condemn the same; not to raise legal discussions or set up any theories about submerged land or the Constitution, regarding which the said Secretary
27 had been long since fully satisfied by the opinion of Attorney
General Garland, Acting Attorney General Philips, and the decisions of the Supreme Court cited in their opinions. The said Chappell does not desire or intend to impute to said Waterworth or his counsel any intentional desire to deceive the circuit court of Anne Arundel county, and believes that the error in swearing that the *locus in quo* was submerged land arose from a too hasty action on their part in not properly comparing the declaration in this cause with the plats, &c.; but that does not alter the fact that the circuit court aforesaid signed the order for removal upon wrong information, and no opportunity was given to said Chappell to appear in said court and contest the same. The said Chappell therefore asks, in view of that fact and the fact that the United States of America are not a party to this suit by consent of this plaintiff, and in view of the fact that it was not made a party thereto in the circuit court of Anne Arundel Co., and in view of the fact said United States could not so be made a party upon a mere desire to acquire title, a proceeding not yet completed, and since the Supreme Court has so fully decided in the cases "9th Howard, 497; 17th Peters, 155; 13th Howard, 25; 1st Howard, 95; 16th Peters, 224 & 261; 18th Howard, 71," the last of which went up from this district, that the title to submerged land is not in the United States of America and has so expressed itself to the same effect in the cases quoted in the previous pages and decided that the said United States possesses

no jurisdiction over the same, and since if this court
28 exercises jurisdiction it will be doing exactly what the Supreme Court—Pollard's Lessee *vs.* Hagan—decided to be unconstitutional, that case having arisen from Congress having passed an act making a grant for submerged land, which the Supreme Court decided to be invalid and void; and since the act of the General Assembly of Maryland passed April 6th, 1874, limits the consent of the State to the exercise of jurisdiction by the United States for light-house sites to five acres in any event, and that therefore this hon. court cannot exercise jurisdiction in this cause, as the land embraced exceeds five acres; that, as it is important to this plaintiff and defendant that the cause should be tried in a proper tribunal, as otherwise any judgment rendered would be void and of no effect, this hon. court, before proceeding to the trial of the case upon its merits by the jury, examine the question of jurisdiction and ascertain whether the said case must not be remanded to the circuit court of Anne Arundel county, Maryland, which the said Chappell prays that it may do; and the said Chappell, as in duty bound, &c.

THOMAS C. CHAPPELL.

Subscribed and sworn to before me this 20th March, 1888.

JAS. W. CHEW, *Cl'k.*

29 EXHIBIT No. 1.

The State of Maryland to all persons to whom these presents shall come, Greeting:

Know ye that whereas John M. Johnston, M. D., of Baltimore city, had surveyed and laid out for him a tract or parcel of land called "The addition to Johnston's harbor," lying in Anne Arundel county, and containing one hundred and thirty-three acres one rood and three and one-quarter perches, by virtue of a special warrant for eighty acres, obtained by him from the land office of Maryland, bearing date the twenty-fourth day of July, eighteen hundred and sixty, as appears; and the said John M. Johnston, M. D., having fully compounded for the same according to law, the State of Maryland doth therefore hereby grant unto him, the said John M. Johnston, M. D., the said tract or parcel of land called "The addition to Johnston's harbor," lying in Anne Arundel county aforesaid, beginning, for the metes and bounds, courses and distances, of the same, at a pine stump standing on beach of the Patapsco river, the same being the remains of an original boundary pine tree, the second boundary of the two tracts of land called "United Friendship" and "Point Lookout," and the beginning boundary of the land conveyed by Charles R. Stewart, trustee, and George Jury, executor to John M. Johnston, by deed bearing date the 26th day of May, 1858, and running from thence along the said river aforesaid, bounding on the tract of land called "Point Lookout" and the line of said conveyance N. 21 degrees and 30′ E. 62 ps.;
30 thence N. 26° 30′ E. 38 ps.; thence N. 31° 30′ E. 42 ps. to the end of Hawkins point; still running with said river of

Patapsco, and from thence bounding thereon N. 62° 30′ W. 14 ps.; thence N. 82° W. 44 ps.; thence N. 87° 30′ W. 58 ps.; thence south 83° 30′ W. 44 ps.; thence N. 86° 45′ W. 52 ps.; thence south 84° 30′ W. 16 ps.; thence south 70° 30′ W. 18 ps.; thence S. 37° W. 4 ps.; thence S. 68° 30′ W. 14 ps.; thence N. 88° 30′ W. 13 ps.; thence N. 74° 15′ W. 5¾ ps. to the end of the second line of a tract of land on the waters of Patapsco river called "Johnston's harbour;" said last line also bounds on the given line of a tract called "Boat harbour," which said tract lies on a creek called Tours creek; thence bounding on the lines of the former, tract called "Johnston's harbour," reverse thereof S. 83° 30′ E. 4 ps.; thence N. 76° 30′ E. 16 ps. to the beginning of said tract; still bounding on said tract, reverse thereof N. 19° W. 42 ps.; thence S. 71° 30′ W. 19½ ps.; thence S. 18° 30′ E. 39 ps. to intersect the aforementioned given line of "Boat harbour" at the end of the 14th line of this survey; thence bounding on said given line north 74° 15′ west 23¾ ps. to the place of beginning of the two tracts of land called "Boat harbour" and "Tread Haven point," at the mouth of Tom's creek and on the beach of the Patapsco river; the said last line runs across the mouth of said Tom's creek; thence bounding on the tract of land called "Tread Haven point" and the said Patapsco river N. 3° E. 8 ps.; thence N. 20° W. 30 ps.; thence N. 6° E. 23 ps.; thence N. 32° E. 30 ps.; thence N. 14° 30′ E. 22 ps.; thence N. 1° W. 62 ps. to Ragged point and to the mouth of Curtis' creek; thence leaving the
31 shore of the Patapsco river and running out into the waters of said river to include the harbour lying off at the mouth of Tom's creek, running S. 29° 10′ E. 154 ps.; said line, if continued, would strike a pine and persimmon trees on the south bank of said river, marked each with twelve notches; thence south 89° 20′ E. 158 ps.; thence S. 80° 30′ E. 53 ps.; thence S. 58° 45′ E. 65 ps.; thence S. 35° W. 158½ ps.; thence N. 75° 45′ W. 5 ps. to the end of the 6th line of the tract called "The Flats of Calmans;" thence running and bounding on the 7th line of said tract N. 75° 45′ W. 23½ ps. to the first place of beginning, containing one hundred and thirty-three acres one rood and three and one-quarter perches of land, according to a certificate of survey thereof taken and returned into the land office, bearing date the first day of August, eighteen hundred and sixty, and there remaining, together with all rights, profits, benefits, and privileges thereunto belonging; to have and to hold the same unto him, the said John M. Johnston, M. D., his heirs, and assigns forever.

Given under the great seal of the State of Maryland this second day of July, eighteen hundred and sixty-one.

LAND OFFICE OF MARYLAND.

I certify that the aforegoing patent is proper to be issued.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the land office of Maryland this second day of July, eighteen hundred and sixty-one.

WILLIAM L. W. SEABROOK,
Commissioner of the Land Office.

32 I hereby certify that the aforegoing is a full and true copy as taken from the original now on file in the office of the clerk of the circuit court for Anne Arundel county.

In testimony whereof I hereto set my hand and affix the [SEAL.] seal of the said circuit court for said county this fifth day of May, A. D. 1884.

SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County.

33 EXHIBIT No. 2.

This deed, made this fourteenth day of August in the year of our Lord one thousand eight hundred and eighty-four, between Philip Schaefer and Thomas Talbot Watson, trustees as hereinafter mentioned of the first part and Thomas C. Chappell of the second part.

Whereas by a decree of the circuit court for Anne Arundel county passed in a deed in which Alinda M. Chappell is complainant, and the unknown heirs of John M. Johnston, deceased, Thomas T. Watson, Margaret S. Watson, his wife and others are defendants the parties hereto of the first part were appointed trustees to make sale of the property described in said proceedings and whereas in pursuance of said decree and a subsequent order of the court the said trustees proceeded to sell said property by public auction on the 7th day of July, 1884 after giving the required notice and complying in all respects with the orders of the court and sold the same to Thomas C. Chappell at and for the sum of nine thousand six hundred dollars, he being the highest bidder therefor.

And whereas said sale has been duly reported to and finally ratified by said court and the entire purchase-money paid by the party hereto of the second part unto the parties of the first part, trustees aforesaid.

Now in consideration of the premises and of one dollar the said Thomas Talbot Watson and Philip Schaefer trustees, do hereby grant and convey to Thomas C. Chappell his heirs and assigns, all the property mentioned and described in the aforesaid cause
34 in the circuit court for Anne Arundel county and contained within the following several descriptions and situated in Anne Arundel county in the State of Maryland.

Beginning at a pine tree heretofore bounded at the end of the first course of said tract called "United Friendship" and at the end of the first course of the land called "Point Lookout" being the beginning of the lands heretofore conveyed by George M. Sellman to George W. and Howard Miller and standing near the tide-water of the Patapsco river, and running thence with and bounding on the tide-water of the Patapsco river as follows to wit: South seven degrees fifteen minutes, west sixty-four perches, south one degree, east fifty-four perches, south seven degrees, east forty perches, south two degrees, west thirty-three perches, south three degrees, west twenty-eight perches, south twenty-six degrees, west eight perches to the beach, at the mouth of Severn creek thence bounding on the first course on the before-mentioned land called "Mary's Last Shift" as

originally expressed, south five degrees, west twenty perches to the gut of said creek, thence south fifty-six degrees, west six perches, north eighty degrees, west thirty perches, north thirty degrees, east twenty-six perches to intersect the west by north three hundred perches course of the before-mentioned land called "United Friendship" thence bounding on said course north seventy-eight degrees, forty-five minutes; west one hundred and two perches to the beginning of the aforesaid land called "Addition to United Friendship" it being at the edge of the tide-water of said creek; thence running with and bounding thereon as follows, to wit: south twenty-six degrees, west ten perches, south fifty-six degrees, west twelve perches, south eighty-nine degrees, west six perches, north fifty-nine degrees, west eight perches, south five degrees, east six perches, south seventy-five degrees, west thirteen perches, south sixty-five degrees, west four perches and one-half of a perch, north seventy-two degrees, west six perches, south fifty-one degrees, west six perches, south eighty-nine degrees, west eight perches, north seventy-eight degrees, west two perches; thence north fifteen degrees, west two hundred and sixty-seven perches to intersect the last course of lot #1 at the end of thirty-seven perches, thence bounding on said course north eighty-two degrees, east seventy-six perches to the end thereof, and thence bounding on the home line of said lot to the place of beginning, containing and laid out for three hundred and thirty-six acres of land, be the same more or less and also all the lands if any, which lie between the said tract of land and the low-water mark of said river and creek, so as to carry the tract hereby described or intended so to be to the low-water mark as heretofore used and enjoyed. Being the same parcel of ground which by deed dated the 16th day of November 1857 and recorded among the land records of Anne Arundel county in Liber N. H. G. #6 folio 623 and was conveyed by E. Beatty Graff, *et al.* to John M. Johnston in fee simple. And also all those parts of the following tracts or parcels of land to wit: Point Lookout, part of United Friendship and part of Boat harbour, lying and being in Anne Arundel county aforesaid and contained within the following metes and bounds, courses and distances to wit:

Beginning for the same at a pine tree heretofore bounded at the end of the first course of said land called United Friendship and the end of the first course of said land called Point Lookout, being the beginning of the lands heretofore conveyed by George M. Sellman to George W. Miller and Howard Miller and standing near the tide-water of the Patapsco river and marked A upon the plat of said land by which George M. Gill, trustee, sold said land to William Williams by deed dated the 27th day of March, 1844, duly recorded among the land records of said county in Liber W. S. G. No. 27 folio 274 and running thence and bounding on the tide-water of said river as follows to wit, north twenty degrees, east sixty-two perches, north twenty-five degrees, east thirty-eight perches, north thirty degrees, east forty-two perches to the end of Hawkins point, still bounding on said river north sixty-four degrees, west fourteen

perches, north eighty-three degrees, thirty minutes west forty-four perches, north eighty-nine degrees, west fifty-eight perches, south eighty-four degrees, west forty-four perches, north eighty-eight degrees fifteen minutes, west fifty-two perches, south eighty-three degrees, west sixteen perches south sixty-nine degrees, west eighteen perches, south thirty-five degrees, thirty minutes, west four perches, south sixty-seven degrees, west fourteen perches, north eighty-
37 seven degrees, west thirteen perches, north forty-nine degrees, thirty minutes, west eighteen perches to the beginning of the aforementioned land called Boat harbour, thence running with and bounding on said land as follows to wit: South sixty-four degrees, west thirty perches, south fifty degrees, west sixteen perches, south eighty-six degrees, west fourteen perches, south four degrees, east thirteen perches, south forty-four degrees, east ten perches, south five degrees, west six perches, south forty-seven degrees, west ten perches, south seventeen degrees, east eight perches, south twenty-six degrees, west ten perches, south fifty-nine degrees, east four perches, north thirty-nine degrees, east four perches north sixty-two degrees, east six perches, south forty-eight degrees, east four perches, south twenty-four degrees, west twelve perches south eighteen degrees, west six perches, south twenty-two degrees, west eight perches south forty-four degrees three perches to the mouth of Richardson's branch, it being the termination of the north course of the aforesaid land called "United Friendship" thence north eighty-two degrees, east one hundred and thirteen perches to a stone now planted, thence with a straight line to the place of beginning, containing and laid out for two hundred and eight acres of land and fifteen acres of water, be the same more or less. Being the same parcel of land which by deed dated the 26th day of May, 1858, and recorded among the land records of Anne Arundel county in Liber N. H. G. No. 7 folio 194 &c. was conveyed by Charles R. Stewart, trustee, *et al.* to John M. Johnson in fee simple and also all those parts
38 of the following tracts or parcels of land lying in Anne Arundel county aforesaid, called the Flats of Calmara, to wit:

Beginning at a pine stump the second boundary of the original tract of land called "United Friendship" standing near the Patapsco river and running from thence bounding on the second line of the above-named tract of land and running with the said river as now corrected for variation the following courses and distances to wit: South nine degrees, fifteen minutes, west eighty perches thence south two degrees, east one hundred and forty-five perches to the beginning of the tract of land called "Mary's Last Shift" thence bounding on the first line of said tract of land as now corrected for variation south eight degrees, west thirteen and one-half perches across the gut of Swann creek, on the beach of the Patapsco river, and intersecting a line of a tract of land called Locust Thicket and a line of the conveyance from John Hall to Hancock thence bounding on said line north fifty-two degrees thirty minutes east four perches to the end of said line at and in the mouth of the gut of Swann creek which place or spot is the place of beginning of the

tract of land called "Mary's Patapsco Plains" and the beginning of the aforementioned conveyance from Hall to Hancock; thence running out into the waters of Patapsco river to include the flats thereof contiguous to said John M. Johnson's land north eighty degrees thirty minutes, east forty-eight perches to deep water of said river; thence running north four degrees, west two hundred and
39 twenty-four and a half perches thence north seventy-five degrees forty-five minutes, west twenty-three and a half perches to the first place of beginning, containing fifty-seven acres and nine and one-quarter perches of land, being the same parcel of ground which by patent under the great seal of the State of Maryland, bearing date the twenty-third day of June A. D. 1859 was granted and conveyed to John M. Johnson.

And also all those parts and parcels of land called "The addition to Johnston's harbour" lying in Anne Arundel county aforesaid to wit: Beginning for the metes and bounds, courses and distances of the same at a pine stump standing on the beach of the Patapsco river the same being the remains of an original boundary pine tree the second boundary the two tracts of land called "United Friendship" and "Point Lookout" and the beginning boundary of the land conveyed by Charles R. Stewart, trustee and George Jury, executor, to John M. Johnston by deed bearing date the twenty-sixth day of May, A. D. 1858 and running from thence along said river aforesaid bounding on the tract of land called "Point Lockout" and the line of said conveyance north twenty-one degrees thirty minutes, east sixty-two perches, thence north twenty-six degrees thirty minutes, east thirty-eight perches, thence north thirty-one degrees thirty minutes, east forty-two perches to the end of Hawkins point still running with said river of Patapsco and from thence bounding thereon north sixty-two degrees thirty minutes, west fourteen perches thence north eighty-two degrees, west forty-four perches, thence north eighty-seven degrees thirty minutes, west fifty-eight perches, thence south eighty-five degrees, thirty
40 minutes, west forty-four perches, thence north eighty-six and three-quarters degrees, west fifty-two perches, thence south eighty-four degrees, thirty minutes, west sixteen perches, thence south seventy degrees thirty minutes, west eighteen perches thence south thirty-seven degrees, west four perches thence south sixty-eight degrees thirty minutes, west fourteen perches, thence north eight degrees thirty minutes, west thirteen perches, thence north seventy-four degrees fifteen minutes, west five and three-quarter perches to the end of the second line of a tract of land on the waters of Patapsco river called "Johnston's harbour" said last line also bounds on the given line of a tract called "Boat harbour" which said tract lies on a creek called "Torris creek" thence bounding on the lines of the former tract called "Johnston's harbour" reverse thereof south eighty-three degrees thirty minutes, east four perches, thence north seventy-six degrees thirty minutes, east sixteen perches to the beginning of said tract, still bounding on said tract reverse thereof north nineteen degrees, west forty-two perches thence south seventy-one degrees thirty minutes, west nineteen and one-half perches,

thence south eighteen degrees thirty minutes, east thirty-nine perches to intersect the aforementioned given line of Boat harbour, at the end of the fourteenth line of this survey; thence bounding on said given line north seventy-four degrees fifteen minutes, west twenty-three and three-quarter perches to the place of beginning the two tracts called "Boat harbour" and "Tread Haven point" at
41 the mouth of Torris creek and on the beach of the Patapsco river said last line runs across the mouth of said Torris creek; -hence bounding on the tract called "Tread Haven point" and the said Patapsco river north three degrees, east eight perches, thence north twenty degrees, west thirty perches; thence north six degrees, east twenty-three perches, thence north thirty-two degrees, east thirty perches, thence north fourteen degrees thirty minutes, east twenty-two perches, thence north one degree, west sixty-two perches to Ragged point and to the mouth of Curtis's creek, thence leaving the shore of the Patapsco river and running out into the water of said river to include the harbour lying off at the mouth of Torris creek running south twenty-nine degrees ten minutes, east one hundred and fifty-four perches said line if continued would strike a pine and persimmon trees on the south bank of said river marked each with twelve notches, thence south eighty-nine degrees twenty minutes, east one hundred and fifty-eight perches, thence S. eighty degrees thirty minutes east fifty-three perches, thence south fifty-eight degrees forty-five minutes, east sixty-five perches, thence south thirty-five degrees, west one hundred and fifty-eight and one-half perches thence north seventy-five degrees forty-five minutes west five perches to the end of the sixth line of the tract called the "Flats of Calmara" thence running and bounding on the seventh line of said tract, north seventy-five degrees forty-five minutes, west twenty-three and one-half perches to the place of beginning containing one hundred and thirty-
42 three acres one rood and three and one-fourth perches being the same parcel of land which by patent dated the second day of July, 1861 under the great seal of the State of Maryland was granted and conveyed to John M. Johnston in fee simple. And also a tract of land called Johnston's harbour situate and lying in Anne Arundel county described as follows:

Beginning at a stone planted on the south shore of the Patapsco river at the water's edge and near the stern of an old schooner wrecked on said shore, and running from thence along the shore of the river the two following courses and distances, to wit: South seventy-six degrees thirty minutes, west sixteen perches, thence north eighty-three degrees thirty minutes, west four perches to a stone planted by the side of the river near the mouth of Torris creek, thence leaving said shore and running out into the waters of said Patapsco river, north eighteen degrees thirty minutes, west thirty-nine perches thence north seventy-one degrees thirty minutes, east nineteen and one-half perches thence south nineteen degrees, east forty-two perches to the first place of beginning, containing five acres of land and being the same parcel of ground which by patent under the great seal of the State of Maryland, and bearing date

June 23rd, 1859 *who* granted and conveyed to John M. Johnston and all the estate, right, title, interest, claim and demand whatsoever at law and in equity of the parties to the aforesaid cause, complainants and defendants and each of them in, to and out of each and every of the aforesaid parcels of ground and premises.

43 To have and to hold to said Thomas C. Chappell, his heirs and assigns in fee simple forever.

Witness our hands and seals.

PHILIP SCHAEFER, *Trustee.* [SEAL.]
THOMAS TALBOT WATSON, *Trustee.* [SEAL.]

Test: WM. B. WILSON.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I hereby certify that on this fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-four, before me, the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, personally appeared in said city Thomas Talbot Watson and Philip Schaefer, trustees, and they did each acknowledge the foregoing deed to be their respective act.

WM. B. NELSON, *J. P.*

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that William B. Nelson, Esquire, before whom the annexed acknowledgments were made and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore,

44 duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore city this 27th day of August, A. D. 1884.

[SEAL.] JAS. BOND,
Clerk of the Superior Court of Baltimore City.

Recorded 28th August, 1884.

STATE OF MARYLAND, *Anne Arundel County,* } *sct:*

I hereby certify that the foregoing is truly taken and copied from Liber S. H. No. 24, folio 166, &c., one of the land record books of Anne Arundel county.

In testimony whereof I hereto set my hand and affix
[SEAL.] the seal of the circuit court for Anne Arundel county this 25th day of February, A. D. 1888.

SPRIGG HARWOOD,
Clk of Cir. C't of A. A. Co., Md.

45 EXHIBIT No. 3.

In the Circuit Court for Anne Arundel County.

In the Matter of the Condemnation for the Use of the United States of America of Land for a Site for Hawkins Point Light-house and a Certain Easement.

To the Honorable Oliver Miller, John E. Smith, and J. Thomas Jones, judges of the circuit court for Anne Arundel county, in the State of Maryland:

The petition of the United States of America, by John C. Mallery, its agent, authorized under the hand and seal of a member of the cabinet of the President of the United States of America, to wit:

The honorable the Secretary of the Treasury respectfully represents unto this honorable court:

1st. That the said United States desires, in conformity with the laws of the State of Maryland, to have condemned for the use and benefit of the said United States, as an aid to navigation of the Patapsco river, certain submerged land in said county for a site for the Hawkins Point light-house, and also for the same purpose as an aid to navigation of the said river to have condemned a certain easement over certain submerged lands as well as over certain lands which are not submerged in said county for the purpose of obtaining an unobstructed prospect for the range lights of
46 Brewerton channel, in the said Patapsco river, the said range lights being Hawkins Point and Leading Point lights.

2nd. That the bounds and quantity of land required for the site of said Hawkins Point light-house are as follows, to wit:

All that tract or parcel of submerged land situated on the west side of Patapsco river, Anne Arundel county, in the State of Maryland, containing two (2) acres within a circle whose centre is at a point which is distant about one-eighth ($\frac{1}{8}$) of a nautical mile in a southeasterly direction from Hawkins point and which bears southwest by west three-fourths ($\frac{3}{4}$) of a nautical mile from Fort Carroll and which has, according to the coast survey chart of the Patapsco river and Baltimore harbor, No. 384, of 1886, latitude 39 degrees 12 minutes and 29 seconds north and longitude 76 degrees 31 minutes and 58 seconds west, and whose circumference or boundary line shall be one hundred and sixty-six and five-tenths (166.5) feet from the centre in every direction.

3rd. That the bounds and quantity of land over which the said easement is required in order to have an unobstructed prospect for the said range lights of the said Brewerton channel are as follows, to wit: An easement and perpetual guarantee against obstruction of the Brewerton channel, Patapsco river range lights, known as Leading Point and Hawkins Point lights, across a strip of submerged land in Thomas cove and in Patapsco river and of Hawkins point proper, said strip to be sixty feet wide, being thirty feet on either side of the said range lights, and to extend from
47 the east side of Thomas cove, Patapsco river, upon said range, across Hawkins point and into the Patapsco river

east of Hawkins point, to the deep and navigable waters of said river, being a total length of five thousand six hundred and fifty (5,650) feet, more or less. The direction of centre line of said strip from Hawkins point light to Leading Point light, according to the coast survey chart of 1886, is north sixty-four degrees thirty minutes west.

4th. That the name of the owner of said land which is not submerged is Thomas C. Chappell, and that he also owns the said submerged lands subject to the public use by the United States of said lands for the purpose of navigation and commerce, and that he resides in Baltimore county, State of Maryland, and is not married and is an adult and *compos mentis*.

And the said petitioner prays that a condemnation of said lands for the uses and purposes aforesaid may be made under the direction of this honorable court in conformity with the laws of Maryland.

And as in duty, &c.

JOHN C. MALLERY,
Agent of the U. S.

THOMAS G. HAYES,
U. S. Dist. Attorney.

ANNE ARUNDEL COUNTY, *State of Maryland,* } *sct:*

I certify that before me, the clerk of the circuit court for
48 Anne Arundel county, on 28th day of November, 1887, personally appeared John C. Mallery, the agent for the United States, as set forth in the aforegoing petition, and made oath on the Holy Evangely of Almighty God that the statements contained in the said petition are true, to the best of his knowledge and belief.

SPRIGG HARWOOD, *Clerk.*

STATE OF MARYLAND, *Anne Arundel County,* } *sct:*

I certify that the foregoing is truly taken and copied from the original petition filed in No. 1184, equity, of the circuit court for Anne Arundel county.

In testimony whereof I hereto set my hand and affix the
[L. S.] seal of the circuit court for Anne Arundel county this 30th day of November, A. D. 1887.

SPRIGG HARWOOD,
Clk to Cir. Ct, A. A. County.

Plats A, B, C follow in order.

(Here follow maps marked pp. 48*a*, 48*b*, & 48*c*.)

49 *Motion of Defendant to Require Plaintiff to Withdraw Paper Filed 20 March, 1888. Filed 24 March, 1888.*

In the Circuit Court of the United States.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

The defendant, by Thomas G. Hayes, his attorney, moves the court to require the plaintiff to withdraw the paper-writing filed in the above cause on the 20th March, 1888, and to substitute for the same a motion in legal form, with the reasons or grounds upon which the said plaintiff relies for the remand of said cause, and he assigns the following reasons for this motion:

1. The said paper is not a statement of any fact which it would be proper to submit to the court as a reason for the remanding of said cause, but the same is argument-ive and irrel*e*vent and has no averment which would be proper in an answer, plea, or motion to present to the court in reply to the petition for removal of the defendant.

2. The said paper does not advise the defendant of any fact or legal reason why the said cause should be remanded, and the defendant is without notice as to the grounds upon which the said plaintiff files this application to remand.

THOMAS G. HAYES,
Att'y for D'f't.

50 Which said last-named motion the court granted, with leave to the plaintiff to file a motion to remand in proper form.

Motion to Remand Case. Filed 24 March, 1888.

In the United States Circuit Court.

CHAPPELL
vs.
WATERWORTH.

Removed from circuit court of Anne Arundel county.

The plaintiff moves the court to remand the above cause for the following reasons:

1. That the said cause does not arise out of the construction of any provisions of the Constitution of the United States.

2. That the said cause does not present any question arising out of the construction or provisions of any act of Congress.

3. That the title and right of possession to said land is not and never has been in the United States.

FRANCIS P. STEVENS,
Sol. for Plaintiff.

51 *Order of Plaintiff to Withdraw the Last-Mentioned Motion to Remand. Filed* 28 *March,* 1888.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Motion to remand.

To the Honorable Thomas J. Morris, judge of said court:

The plaintiff, Thomas C. Chappell, respectfully withdraws the last motion for remand filed in the above case, filed March 24, 1888.

FRANCIS P. STEVENS,
Att'y for Pl'ff.

March 28, 1888.

52 *Replication to Defendant's Pleas. Filed* 3 *April,* 1888.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Replication.

1. The plaintiff, by John P. Poe and Francis P. Stevens, his attorneys, joins issue as — the defendant's first plea.

2. And for replication to the second plea the plaintiff says that the land described in the declaration is not now and has not ever been submerged land, which is now and ever has been a part of the bottom of the Patapsco river.

JOHN P. POE,
FRANCIS P. STEVENS,
Att'ys for Pl'ff.

Endorsed: "Service of copy admitted this 3rd day of April, 1888. Thos. G. Hayes, att'y for def't."

Issue joined on first plea.

53 *Defendant's Amended Second Plea. Filed* 21 *June,* 1888.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

The defendant, James M. Waterworth, by Thomas G. Hayes, his attorney, and also United States district attorney for the district of Maryland, appearing, by direction of the Attorney General of the United States, on behalf of the United States, for an amended sec-

ond plea and in lieu of and as a substitute for said original second plea says—

That the land described in the declaration in this cause, with the exception of about one-fourth of an acre of said land, which is fast land, and designated and described on plat marked "B" and filed in this cause, is now and always has been submerged land at the bottom of the Patapsco river, the same being one of the navigable rivers of the United States; and the defendant avers that he is not now nor ever has been, either for himself or for or on behalf of the United States, in possession of any portion of said fast land described in said declaration, and he herewith and hereby files this his disclaimer to any title or right of possession in himself in his own right or for or on behalf of the United States to said fast land; and the defendant further avers that the only portion of said submerged land which has been and is now in his possession is that portion of said submerged land used as a site for Hawkins Point light station, and embraces so much of said submerged land as is necessary to hold and support nine iron piles eighteen inches in diameter, on which piles, at the distance of twelve feet above mean high tide, the wooden superstructure of the said light station is placed, the said wooden superstructure resting upon said piles being a square area twenty-seven feet square; the centre pile of said nine piles is at the centre of the said square superstructure and is situated at a point distant about one-eighth of a nautical mile in southeasterly direction from Hawkins point and bearing southwest by west three-fourths of a nautical mile from Fort Carroll, in the Patapsco river, and which, according to the coast survey chart of 1872, is in latitude 39 degrees 12 minutes and 21 seconds north and longitude 76 degrees 31 minutes and thirty-six seconds west. The said point is distant from the ordinary high-water mark of the adjacent shore 210 feet, more or less; and the defendant further avers that the said portion of submerged land above described is now and has been since the year A. D. 1868 in the possession of the United States as the site of Hawkins Point light station, the same being built in said year by the light-house board of the United States under the authority and by direction of the Congress of the United States, and is now and ever has been one of the range lights of the Brewerton channel of the Patapsco river, and is now and ever has been used as a light to aid in the navigation of said river.

And the defendant further avers that on the 20th day of February, A. D. 1877, the State of Maryland, by deed executed in conformity to law, ceded to the United States jurisdiction over said site as above described; and this defendant says that he is now and has been since the year A. D. 1882 in possession of said site for and on behalf of the United States by appointment of the Secretary of the Treasury of the United States as the keeper of said light-house station.

And this the defendant is ready to verify.

THOMAS G. HAYES,
Att'y for Def't.

56 *Replication to Amended Second Plea. Filed* 21 *June*, 1888.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Replication to amended 2nd plea.

The plaintiff, for replication to the defendant's amended second plea, by John P. Poe and F. P. Stevens, his attorneys, says that the land described in the declaration, with the exception of about one-fourth of an acre of said land, which is fast land and designated and described on plat marked "B," is not now nor has it always been submerged land, at the bottom of the Patapsco river.

And he further says that the portion of the land described in the said plea as the site of "Hawkins Point light station" is not the only part of the land described in the declaration now in the possession of the defendant.

And this he is ready, &c.

JOHN P. POE,
FRANCIS P. STEVENS,
Att'ys for Pl'ff.

57 *Exception to Jurisdiction and Motion to Remand and Chart. Filed* 23 *June*, 1888.

In the Circuit Court of the United States for Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Thomas C. Chappell, the plaintiff in the above-entitled cause, excepts to the jurisdiction of the courts of the United States in said cause for the following reasons:

1st. Because jurisdiction was not delegated to the courts of the United States in controversies between citizens of the same State claiming lands, except where the parties claim under grants from different States, and the land in said cause lies wholly within the State of Maryland, and both the plaintiff and defendant are citizens of the State of Maryland, and jurisdiction in said cause is reserved to the State.

2nd. Because said cause was improperly removed from the State court and contrary to the provisions of the Revised Statutes and the act of Congress, sess. 11, 1887, U. S. Statutes at Large, vol. 24, chap. 373, page 552. Sec. 647 of the Revised Statutes provides: "If in any action commenced in a State court where the title of land is concerned and the parties are citizens of the same State either party before the trial states to the court and makes affidavit, if they require it, that he claims and shall rely upon a right or title to the

land under a grant from a State other than that in which
58 suit is pending, and produces the original grant or an exemplification of it, and move- that the adverse party inform the court whether he claims a right or title to the land under a grant from the State in which the suit is pending, and if he does claim under such grant, the party claiming under the first mentioned may, on motion, remove the cause for trial into the next circuit court to be holden in the district where such suit is pending."

The act of Congress, U. S. Statutes at Large, vol. 24, chap. 373, page 552, provides (see page 552) for original jurisdiction in the circuit court of the United States concurrent with the courts of the State in a controversy between citizens of the same State claiming lands under different States.

On page 554 said act provides: "And if, in any action commenced in a State court, the title of land is concerned and the parties are citizens of the same State, one or more of the plaintiffs or defendants before the trial may state to the court that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produces the original grant or an exemplification of it, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States to be next holden in said district;" from which it fully appears that
59 in controversies between citizens of the same State in which the title to land (and consequent right of possession) is concerned by the acts of Congress in such cases made and provided no removal can be had from a State court unless the parties claim by grants from different States, and in said cause, which is a controversy between citizens of the State of Maryland, in which the title to land is concerned lying wholly within the State of Maryland, there was no such motion made in the State court and no information to show to said court that the parties claimed by grants from different States, and therefore the removal of this cause from the State court was contrary to the law of the United States and the acts of Congress in such cases made and provided.

3rd. That making the officer of the United States a party to said cause does not make the United States of America a party to said cause, and said United States cannot be so made a party by any department or officer thereof less than "the Congress," the law-making power.

The action is not against the defendant on account of any law of the United States, but is an action to recover the land of this plaintiff which has been unreasonably seized and of which this plaintiff has been deprived without due process of law and without just compensation.

That the said land does not lie in the channel of the Patapsco river, as will more fully appear from coast survey chart No. 384 of

the Patapsco river and Baltimore harbor, prepared and published by the officers of the United States, a copy of which chart is herewith filed and it is prayed may be taken as a part of this motion.

60 That the Supreme Court of the United States has decided that lands similarly situated were not granted by the Constitution of the United States, but reserved to the States respectively, so that there is no constitutional question remaining for this court to determine in this cause.

That the title and consequent right of possession of the land embraced in this cause has been passed upon by the Attorney General of the United States, and that he has furnished the Secretary of the Treasury an opinion relating to said land and the title thereto and consequent right of possession, in which it is determined that the title to said land is not in the United States, but said title and consequent right of possession is in Thomas C. Chappell, a copy of which opinion is herewith filed and it is prayed may be taken as a part of this motion.

Wherefore, in order that the said cause may be tried in a court of competent jurisdiction, the plaintiff moves this honorable court to remand the same to the circuit court of Anne Arundel county, to which is reserved exclusive jurisdiction therein and from which said cause was removed contrary to law.

THOMAS C. CHAPPELL.

61 ATTORNEY GENERAL'S OFFICE,
WASHINGTON, *July 6th*, 1886.

To the Secretary of the Treasury:

I herewith return the papers which accompanied your letter to me of the 5th of April last, in relation to the title to the light-house site at Hawkins point, Maryland, together with a report upon this subject made by the U. S. attorney for the district of Maryland under date 28th of May last.

It appears that a light-house was built on the site referred to in the year 1868, probably under the provision in the act of July, 1866, chapter 296, "for the establishment of beacon lights to mark the Brewerton channel, Patapsco river." The site was located on the bed of that river and covered by the waters thereof, which are navigable waters of the United States.

Previous to the erection of the light-house thereon it would seem no attempt was made to acquire for the United States title thereto, the Government officers then in charge of the work, perhaps, regarding this as unnecessary, in view of the circumstances that the site was located under navigable water. Subsequently, however, application was made in behalf of the United States to the governor of Maryland for a grant of the site from the State, and also a cession of its jurisdiction over the same, under the provisions of an act of the Maryland legislature passed April 6th, 1874, and the governor, by deed dated February 20th, 1877, made under authority of that

act, granted to the United States the site (embracing an area
62 of five acres) and ceded to the United States jurisdiction over it.

By that deed the United States acquired (along with the jurisdiction ceded) such title as the State then had to the land granted and nothing more.

But the ownership of the premises is claimed by Mr. Thomas C. Chappell, who deduces his title from a prior grant made by the State of Maryland by a patent issued on the second day of July, 1861, a copy of which is among the papers herewith.

Each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away, subject to the paramount right of navigation.

Pollard's Lessee *vs.* Hagan, 3 How., 212.
McCready *vs.* Virginia, 94 U. S., 391.

And the United States attorney states in his report that "by the practice of the land office of Maryland and by the decisions of its court of appeals construing its law and legislation, patents could be and have always been granted for land covered by navigable water, which by such decisions and practice have been held to pass to the grantee all the soil under the water included within the outlines of the grant, with all the rights of property incident thereto, subject only to the rights of the public as to fishing and navigation (see 1st Gill, 512). This existed until the passage of the act of assembly of Maryland of 1862, chapter 129, sec. 3, which prohibited the issue of any patent for land covered by navigable waters."

63 According to the plat of the survey covered by said patent of July 2nd, 1861, the light-house site at Hawkins point and all the land granted to the United States by the governor of Maryland by his deed of February 20th, 1877, are within the boundaries of that patent, the existence of which, it may here be observed, had not been brought to the notice of this department when (in June, 1877) it first had occasion to consider the legal effect of that deed.

As the deed of the governor was not executed until after the State had by its patent granted away the premises, no title thereto whatever passed by such deed.

But the title which was acquired under the patent from the State, and which appears to be a valid one by the law of the State in force when such patent was issued, is subject to the paramount right of navigation, the regulation whereof as regards the waters mentioned has been granted to the United States. The power to regulate navigation, however, would seem not to carry with it any such right in or to the soil under navigable waters as to warrant its permanent and exclusive occupancy by the General Government for the purpose of establishing a light-house thereon without regards to or in derogation of the rights of ownership of the premises—that is to say, without obtaining a grant of the soil from the owner thereof or acquiring the same by condemnation, which contemplated making him just compensation therefor. (See 16 Opinion, 370.) Certainly

no title thereto can be derived by the United States from the mere erection of a light-house thereon under authority of Congress. (7 Opin., 314.)

64 Upon the facts presented by these papers I am of the opinion that the title to the light-house site at Hawkins Point is not in the United States, but in the said Thomas C. Chappell.

I am, sir, respectfully, &c., A. H. GARLAND,
Attorney General.

NOTE.—The chart called for is a map of the Patapsco river and Baltimore harbor. No copy to attach to the record.

65 *Motion of Plaintiff to Amend His Motion Filed on the* 20 *March,* 1888. *Filed* 7 *February,* 1889.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

The plaintiff moves to amend, in accordance with the provisions of sec. 954 of the Revised Statutes of the United States, his motion filed March 20th, 1888, by striking therefrom so much thereof as is impertinent and irrelevant and by prefixing thereto the following words, viz: "The plaintiff pleads to the jurisdiction of this court because the grounds upon which the defendant removed this cause from the State court are *res adjudicata* and do not present a Federal question," and further to amend said motion by attaching thereto and making a part thereof his motion filed June 23rd, 1888.

THOS. C. CHAPPELL, *Plaintiff.*

66 *Motion to Remand Case Refused. Order Filed* 4 *June,* 1889.

In the U. S. Circuit Court.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Ordered by the court this the 4th day of June, A. D. 1889, that the motion heretofore made by the plaintiff to remand the above case to the circuit court of Anne Arundel county be, and is hereby, refused.

THOS. J. MORRIS, *Judge.*

Replication to Defendant's Amended 2nd Plea Withdrawn.

Same day, to wit, June 4, 1889, motion of the plaintiff to withdraw his replication to the defendant's amended second plea. Leave of the court granted and replication withdrawn.

Demurrer and Issue.

Same day plaintiff demurs to the amended second plea of defendant, and the defendant joins issue on the demurrer.

Same day the court overruled the demurrer and granted leave to the plaintiff to reply.

67 *Motion for Leave to Amend and File Plea to Jurisdiction and Abatement. Filed 5 June, 1889.*

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

The plaintiff, Thomas C. Chappell, prays leave to amend in accordance with sec. 954, Revised Statutes, the paper filed by him March 20th, 1888, by striking therefrom every part thereof that is irrelevant and impertinent, and by adding thereto the paper filed by the said plaintiff June 23, 1888, and the paper filed by him Feb. 7, 1889, and by making the aforesaid papers a plea to jurisdiction and in abatement in proper form.

THOMAS C. CHAPPELL.

June 5th, 1889.

Which said last-mentioned motion the court refused. Exception noted.

68 *Replication to Defendant's Amended Second Plea. Filed 8 June, 1889.*

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Replication to amended 2nd plea.

The plaintiff, by John P. Poe and Francis P. Stevens, his attorneys, for replication to the defendant's amended second plea says that when possession was taken in 1868 of the portion of submerged land described in said plea, as and for the site of Hawkins Point light station, the said land was held and owned in fee simple by a certain John M. Johnston, under a good and sufficient patent to him therefor from the State of Maryland, dated July 2, 1861, and that such possession was taken, as in said plea alleged, without any grant of any kind from said Johnston and without any compensation being paid or tendered to him for said land or for any use of or easement in the same, and that the plaintiff at the time of the in-

stitution of this suit and for a long time prior thereto held and still holds the legal title to said land in fee simple as successor in title of said John M. Johnson, and that no compensation has ever been paid or tendered to him for said land or for the use thereof or for any easement therein, nor has any deed or grant of any kind ever
69 been made by him to any person whatsoever of said land or of any interest, right, or easement therein.

And this he is ready, &c.

JOHN P. POE,
FRANCIS P. STEVENS,
Att'ys for Pl'ff.

Defendant's Rejoinder. Filed 8 *June,* 1889.

In the U. S. Circuit Court of District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

The rejoinder of the defendant to the replication of the plaintiff says that the title of the plaintiff to the site of Hawkins Point light-house is derived from a patent of the State of Maryland to J. M. Johnson, as stated in said replication, and which is fully set out in the deed heretofore filed in this cause and marked "Exhibit No. 1," and platted in plat filed in said cause and marked "A," and is subject to an easement of navigation, the regulation and enforcement of which is in the United States; and of this the defendant put himself on the country.

THOMAS G. HAYES,
U. S. Att'y.

70 *Motion That Defendant's Rejoinder be Not Received. Filed* 8 *June,* 1889.

THOS. C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Motion.

The plaintiff respectfully prays the court not to receive and permit to be filed the rejoinder tendered for filing by the defendant, for the reason that it is not a traverse of the replication, nor does it confess & aver the averments of the replication, nor does it demur to the same.

JOHN P. POE,
FRANCIS P. STEVENS,
Att'ys for Plaintiff.

Which said motion last above mentioned the court granted.

Thereupon the defendant demurs to the replication of the plaintiff to the defendant's amended 2nd plea, and the plaintiff joins issue on the demurrer. The general-issue plea of the defendant, on motion of the defendant and by leave of the court, is withdrawn.

71 *Opinion of the Court. Filed* 8 *June*, 1889.

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH (Keeper of the U. S. Light-house at Hawkins Point).

Ejectment.

The brief filed by the learned district attorney correctly states the case made by the pleadings, and his full citations from the decisions of the Supreme Court applicable to the question raised makes it unnecessary to quote them in this opinion.

The plaintiff, by this action of ejectment, seeks to dispossess the United States of a light-house built by the United States light-house board in the year 1868 under authority of Congress. It is erected upon piles in the waters of the Patapsco river, where the tide ebbs and flows, at the distance of about two hundred and ten feet from the shore, and it is one of the range lights of the main channel of the river, known as the Brewerton channel, which is the only approach for vessels of large draft to the port of Baltimore. In this channel the natural depth of the water was about sixteen feet. It has been deepened to over twenty-seven feet for the purpose of admitting large-class ocean steamers, and it is kept dredged
72 out, buoyed, and lighted by the constant supervision of the proper United States authorities with appropriations made by Congress.

It is conceded that the Hawkins Point light, as now located, is required for the safe navigation of the channel by ships engaged in foreign commerce. It covers an area of only twenty-seven feet square.

The plaintiff has acquired by grant and now owns all the title and right in the upland and the shore opposite this light-house and in the bed of the river covered by this light-house which the State could grant, and has the riparian rights specially confer-ed by the Maryland act of 1862, chapter 129, by which it was enacted that—

"The proprietor of land bounding on any navigable waters of this State is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Such improvements and other accretions as above provided for shall pass to the successive owners of the land to which they are attached as incident to their respective estates, but no such improvement shall be so made as to interfere with the navigation of the stream of water into which said improvement is made."

In fact, the plaintiff never has availed of this privilege of improving out into the water covered by the light-house, but the right to do so is a valuable riparian right not to be arbitrarily or capriciously destroyed.

Yates *vs.* Milwaukee, 10 Wal., 534.

73 It is, however, a privilege which must be exercised subject to the right of the public to use the river for the great primary and paramount purpose of navigation and for furnishing the usual and necessary aids to navigation.

The ruling in Yates *vs.* Milwaukee was that when, under legislature permission or in accordance with his privilege as riparian owner, the owner of land bounding on a navigable stream has actually made his improvement and by such improvement that portion of the stream so improved or reclaimed has ceased to be part of the navigable water and is appropriated to private use, it can then only be taken to improve navigation upon proper compensation being made, as for any other strictly private property. Such was the effect of the mandate of the Supreme Court in that case in reversing the decree below.

But while the submerged land remains a part of the bed of the river it is not private property in the sense of the 5th amendment to the Federal Constitution, as was declared in Gilman *vs.* Philadelphia, 3 Wal., 725: "The navigable waters are the public property of the nation, subject to all requisite legislation by Congress."

In the hands of the State or of the State's grantee, the bed of a navigable river remains subject to an easement of navigation which the General Government can lawfully enforce, improve, and protect.

It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that in
74 order to develope the greatest public utility of a waterway private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court. The following are cases all involving that proposition: The Blackbird Creek case, 2 Peters, 245; Gilman *vs.* Philadelphia, 3 Wal., 713; Parnel *vs.* Turck, 95 U. S., 459; Wisconsin *vs.* Duluth, 96 U. S., 379; South Carolina *vs.* Georgia, 93 U. S., 4. If it were made apparent to Congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of the stream or its use as a highway of commerce, Congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended and the plaintiff would have no claim for compensation.

If the plaintiff could thus lawfully be prevented from appropriating to his private use any part of the submerged land lying in front of his shore line and the whole of it be kept subservient to the easement of navigation, how can it be successfully claimed that he must be paid for the small portion covered by the light-house, 200

feet from the shore, which has been taken for a use as strictly necessary to safe navigation as the improved channel itself?

The court of appeals of Maryland, whenever called upon to declare the nature of the title of the State and its grantees in the land at the bottom of its navigable streams, has uniformly held that the soil below high-water mark was as much part of the *jus*
75 *publicum* as the stream itself. Day *vs.* Day, 22 Md., 537, and in the leading Maryland case of Browne *vs.* Kennedy, 5 H. & J., decided in 1821, discussing the nature of the property in the soil covered by navigable rivers in Maryland, it was said: "It is very certain that by common law the right (to the soil) was in the King of England, and it seems equally clear that he had the capacity to dispose of it *sub modo*. Whatever doubts are entertained on the subject they probably have arisen from inattention to the distinction between the power of granting an exclusive privilege in violation or restraint of a common pisca-rial right or other common right, as that of navigation and the power of granting the soil *aqua cooperta* subject to the common user. The subject has *de communi jure* an interest in a navigable stream, such as a right of fishing and of navigating, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since Magna Charta at least; but the property in the soil may be transferred by grant, subject, however, to the *jus publicum*, which cannot be prejudiced by the *jus privatum* acquired under the grant.

The same doctrine has been recently enforced with regard to the character of the ownership of New Jersey in the lands under the navigable waters of that State. Mr. Justice Bradley in Stockton *vs.* B. & N. Y. R. Co., 32 Fed. Rep., 19.

It appears, therefore, that the private interest granted to the plaintiff in the soil in question was of necessity granted to him subject to the use which the United States is now making of it in aid
76 of navigation, and that the special plea to plaintiff's action of ejectment sets up a perfect defense to the action.

The plaintiff's replication to the defendant's special plea simply avers that when possession of the submerged land was taken by the United States, as in the plea alleged, the plaintiff held title to it under the grants from the State and still holds said title, and that he has never been paid or tendered any compensation therefor.

This, in my opinion, is no answer to the plea, and the defendant's demurrer to it is sustained.

The plaintiff electing to stand on his replication, judgment will be entered for the defendant.

Judgment for Defendant on Demurrer.

Whereupon all and singular the premises being seen, heard, and by the court here fully understood and mature deliberation being thereupon had, it appears to the court here that the replication of the plaintiff to the defendant's amended second plea above pleaded and the matters therein contained are not sufficient in law. There-

fore it is considered by the court here that the said demurrer be sustained, and that the said defendant recover against the said plaintiff the land described by metes and bounds in the amended second plea of the said defendant, and which land in said plea is averred to be submerged land in the Patapsco river and the site of Hawkins Point light-house, and that the said defendant have thereof his possession against the said plaintiff.

And that the said plaintiff recover against the said defendant, under the said defendant's disclaimer set forth in the said defendant's amended second plea, that portion of land described by metes and bounds in the declaration and said plea, and which is therein described as fast land and not submerged land, and that the plaintiff have thereof under the said disclaimer his possession against the said defendant and the said defendant go, therefore, without day, &c. It is also considered by the court here that the said defendant do recover against plaintiff the sum of seventy-seven dollars and eight cents for his costs and charges by him in this behalf sustained, and that he have thereof his execution.

77 MEMORANDUM.—Judgment was rendered in this cause on the 8th day of June, 1889. Demurrer sustained and judgment on demurrer for defendant with costs.

Plaintiff's Bills of Exception. Filed 8 June, 1889.

Before the rendition of the judgment aforesaid the said plaintiff, by his attorney, filed in court the following bills of exception:

In the Circuit Court of the United States for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

At the trial of this cause the plaintiff filed a paper, March 20, 1888, as shown in the record, and the court ordered it to be withdrawn, to which the plaintiff prayed leave to except, and that the court would sign and seal this his first bill of exceptions, according to the form of the statute in such case made and provided, and which is accordingly done this 8th day of June, in the year 1889.

THOS. J. MORRIS, *Judge.* [SEAL.]

78 And, further, at the trial of the said cause the plaintiff moved the court to remand the said cause to the State court, which the court refused to do, by an order passed June 4th, 1889, to which the plaintiff prayed leave to except, and that the court would sign and seal this his second bill of exceptions according to the form of the statute in such case made and provided, and which is accordingly done this 8th day of June, in the year 1889.

THOS. J. MORRIS, *Judge.* [SEAL.]

And, further, at the trial of the said cause the plaintiff moved the court, by petition filed June 5th, 1889, to grant leave to allow him to amend the form of the paper filed March 20th, 1888, "by striking therefrom every part thereof that is irrelevant and impertinent and by adding thereto the paper filed by the said plaintiff June 23rd, 1888, and the paper filed by him Feb. 7th, 1889, and by making the aforesaid papers a plea to the jurisdiction and in abatement in proper form," which the court refused to do, to which the plaintiff prayed leave to except, and that the court would sign and seal this his third bill of exceptions according to the form of the statute in such cases made and provided, and which is accordingly done this 8th day of ——, in the year 1889.

THOS. J. MORRIS, *Judge.* [SEAL.]

79 And, further, at the trial of the said cause the plaintiff filed a demurrer to the defendant's amended second plea, and the court overruled the said demurrer, with leave to said plaintiff to answer further to the action of the court in overruling the said demurrer. The plaintiff prayed leave to except, and that the court would sign and seal this fourth bill of exceptions according to the form of the statute in such case made and provided, and which is accordingly done this 8th day of June, in the year 1889.

THOS. J. MORRIS, *Judge.* [SEAL.]

And, further, at the trial of the said cause the plaintiff filed a replication to the defendant's amended second plea, to which replication the defendant demurred, and the court sustained the demurrer; and, the plaintiff electing to stand on his demurrer, the court entered judgment for the defendant on the demurrer to. The action of the court in sustaining the said demurrer and in entering judgment for the defendant, the plaintiff prayed leave to except, and that the court would sign and seal this his fifth bill of exceptions according to the form of the statute in such case made and provided, and which is accordingly done this 8th day of ——, in the year 1889.

THOS. J. MORRIS, *Judge.* [SEAL.]

80 *Prayed for Writ of Error. Filed* 19 *June,* 1889.

In the United States Circuit Court for the District of Maryland.

THOMAS C. CHAPPELL
vs.
JAMES M. WATERWORTH.

Action: Ejectment.

To the honorable the judges of the circuit court of the United States for the district of Maryland:

The plaintiff in this case prays for a writ of error to the Supreme

Court of the United States from the rulings and judgment of this court, and that citation issue thereon.

JOHN P. POE,
FRANCIS P. STEVENS,
Att'ys for Plaintiff.

Let the writ issue as prayed.

THOS. J. MORRIS, *Judge.*

81 *Writ of Error Bond. Filed 19th June, 1889.*

Know all men by these presents that we, Thomas C. Chappell, of Baltimore county, in the State of Maryland; Walter B. McAtee, of Baltimore city, State of Maryland, and Thomas Cassard, of Baltimore city, State of Maryland, are held and firmly bound unto James M. Waterworth, of Anne Arundel county, State of Maryland, in the full and just sum of five hundred dollars, to be paid to the said James M. Waterworth, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally and firmly by these presents,

Sealed with our seals and dated this 19th day of June, A. D. 1889.

Whereas lately in the circuit court of the United States for the district of Maryland, begun and held at the city of Baltimore during the present term, in a suit depending between the said Thomas C. Chappell as plaintiff and the said James M. Waterworth as defendant, a judgment was rendered in favor of the said Thomas M. Waterworth, from which said judgment the said Thomas C. Chappell has prayed an appeal and a writ of error to next term of the Supreme Court of the United States of America:

Now the condition of the above obligation is such that if the said Thomas C. Chappell should persecute his said appeal with effect and answer all costs if he fails to make his plea good, then the
82 above obligation to be void; else to remain in full force and virtue.

THOMAS C. CHAPPELL. [SEAL.]
WALTER B. McATEE. [SEAL.]
THOS. CASSARD. [SEAL.]

Sealed and delivered in presence of—
JOHN S. LUSK.

Endorsed: "Bond approved. Thos. J. Morris, judge."

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or

some of you, between Thomas C. Chappell, plaintiff, and James W. Waterworth, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court, Maryland.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19 day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

JAS. W. CHEW,
Clerk of the Circuit Court of the United States,
District of Maryland.

Allowed by Hon. Thos. J. Morris, judge Maryland district.

[Endorsed:] Chappell *vs.* Waterworth. Writ of error. Copy of this writ filed in the clerk's office in the case, where the record remains, on the 19 June, 1889. Jas. W. Chew, cl'k.

84 Thereupon it is ordered by the court here that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the Supreme Court of the United States to be holden at Washington on the second Monday of October next, and the same is transmitted accordingly.

85 The United States of America to James W. Waterworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the district of Maryland, wherein Thomas C. Chappell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error men-

tioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand and the seal of the said circuit court on this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

The Seal of the Circuit Court, Maryland.

THOS. J. MORRIS, *Judge.* [SEAL.]

Service admitted on this 24 day of June, 1889.

THOMAS G. HAYES, *U. S. Att'y.*

[Endorsed:] Chappell *vs.* Waterworth. Citation.

86 | *Certificate.*

DISTRICT OF MARYLAND, *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the district of Maryland, do certify that the foregoing is a full and true record of the proceedings and judgment of the said court in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this twentieth day of July, A. D. 1889.

The Seal of the Circuit Court, Maryland.

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Case No. 13,992. Maryland C. C. U. S. No. 321. Thomas C. Chappell, plaintiff in error, *vs.* James M. Waterworth. Filed March 4, 1890.

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IN THE

Supreme Court of the United States.

TERM No. 321. OCTOBER TERM, 1892.

THOMAS C. CHAPPELL, *Plaintiff in Error.*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

On December 23d, 1887, the plaintiff in error brought an action of ejectment against the defendant in error in the Circuit Court for Anne Arundel county in the State of Maryland, (Record, page 1,) Afterwards, the cause was, on the application of the defendant in error, removed to the Circuit Court of the United States for the District of Maryland, (Record, page 3.) The object of the action was to recover possession of some five acres of land lying under the waters of the Patapsco river, near its western bank, and a few miles from Baltimore city, and also to obtain mesne profits to the amount of thirty-three thousand three hundred and thirty-three dollars and thirty-three and one-third cents. (Record, page 2.) The defendant in error was the keeper of the Hawkins Point Light-house, which had been erected on the land in 1868 by the Federal Light-house Board, pursuant to an Act of Congress appropriating thirty thousand dollars "for the establishment of beacon lights to mark Brewerton channel, Patapsco river." (Section 4658, R. S., Act 28th July, 1886, 14 S. L., 313.)

The light-house is one of the range lights erected in aid of navigation over the Brewerton channel, the main channel leading to the port of Baltimore from the Chesapeake bay.

The defendant in error filed a plea to the declaration, in which he disclaimed title to all the land sued for, except so much as was used as a site for the light-house, or an area about twenty-seven feet square, and averred that this latter area was then, and had been since the year 1868, in the possession of the United States, as the site of the Hawkins Point Light Station, the same having been built in said year by the Light-House Board of the United States, under the authority and by the direction of the Congress of the United States, and was then and ever had been one of the range lights of the Brewerton channel of the Patapsco river, and was then and ever had been used as a light to aid in the navigation of the said river. (Record, page 26.)

To this plea, the plaintiff in error then replied that, when possession was taken in 1868, of the portion of submerged land described in said plea as and for the site of Hawkins Point Light Station, the said land was held and owned in fee simple by a certain John M. Johnson, under a good and sufficient patent to him therefor from the State of Maryland, dated July 2d, 1861, and that such possession was taken, as in said plea alleged, without any grant of any kind from said Johnson, and without any compensation being paid or tendered to him for said land or for any use of or easement in same, and that the plaintiff, at the time of the institution of the suit and for a long time prior thereto, held and still held the legal title to said land in fee simple, as successor in title of said John M. Johnson, and that no compensation had ever been paid or tendered to him for said land or for the use thereof or for any easement therein, nor had any deed or grant of any kind ever been made by him to any person whatsoever of said land or of any interest, right or easement therein. (Record, pages 32-33.) To this replication the plaintiff in error demurred (Record, page 34) and the Court sustained the demurrer and entered up judgment thereon. (Record, page 36.)

Specification of Errors.

The Court below erred in sustaining the demurrer:

1. Because, while it is true that, taken as a whole, all the public navigable waters, and the soils under them, are vested in the several States in trust for the public uses of navigation and fishery, still the several States have the right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters.

2. Because, when a patent has been issued to a citizen by a State for land under such waters, such patent must be presumed, until the contrary is shown, to grant portions of the whole that can be granted without substantial impairment of the interest of the public in the waters.

3. Because when such patent is issued, if the presumption mentioned is not overthrown, the effect of the patent is to pass an absolute and unqualified title, wholly free from the trusts of navigation and fishery, to the State's grantee, and consequently such a title as cannot be taken by the Federal Government under the commercial, or any other power, without paying for it.

Authority is hardly needed for the proposition that after the Revolution the several States became vested with the ownership of all their navigable waters and the soils under them, or for the further proposition that the same were not granted by the Federal Constitution to the United States, but were reserved by the several States themselves.

Martin et als. vs. Waddell, 16 Peters, 410.
Pollard's Lessee vs. Hagan, 3 How. 212.
Goodtitle vs. Kibble, 9 How. 471.
Doe vs. New Jersey, 15 How. 432.
Munford vs. Harbor Com's, 18 Wall. 57.
Illinois Central R. R. Co. vs. Illinois, 146 U. S. 435.

It is admitted that taken as a whole the navigable waters of a State and the soils under them are held by the State, subject to the easements of navigation and fishery, in the

public; or to change the form of the expression, in trust for the public uses of navigation and fishery. But since the decision of this Court in the recent case of the Illinois Central R. R. Co. vs. Illinois, 146 U. S. 387, the right of a State to make an absolute and unqualified grant of such portions of its navigable waters and the soil under them as can be granted without any substantial impairment of the public interest in the waters, cannot well be controverted.

This Court said in that case, pages 452-453:

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining*, that are chiefly considered in the adjudged cases as a valid exercise of legislative power, consistently with the trust to the public, upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of

an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the land and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.* General language sometimes found in the opinions of the Courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, *must be read and construed with reference to the special facts of the particular case.* A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, *except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains,* than it can abdicate its police powers in the administration of government and the preservation of the peace."

Here we have repeated declarations of the clearest description to the effect that grants by the State, of parcels of lands under navigable waters that may afford foundation for

wharves, piers, docks and other structures in aid of commerce, or grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, may be made to individuals wholly free from the control which the State has for the purposes of the trusts of navigation and fishery, and wholly free from the trusts themselves. The effect of such grants is to vest in the grantee an absolute, unqualified fee simple title, subject only to the right of eminent domain inherent in the State and Federal Government in the exercise of the respective powers conferred upon them by the people.

The State having issued a patent to the predecessor in title of the plaintiff in error, this patent furnishes presumptive evidence of its own regularity and validity, and must be assumed, until the presumption is overturned, to have been issued for a parcel of one or the other of the two classes of land under navigable waters that it is competent for a State to grant free from the trusts of navigation and fishery.

Jackson vs. Marsh, 6 Cow. 281.
People vs. Mauran, 5 Den. 389.
United States vs. Stone, 2 Wall, 525, 535.

IV.

And that the site of the light-house could in point of fact be granted by the State without any substantial impairment of the interest of the public in the waters above, appears from the statement of the plaintiff in error (Record, page 8) that parties in his employ had walked out and entered the light-house, and that the same is sometimes almost entirely upon dry ground.

It follows that if the patent conveyed submerged land that the State could and did convey free from the trusts of navigation and fishery to the plaintiff in error's predecessor in title, the Federal Government cannot take this land without making due compensation to the plaintiff in error. It (the submerged land) when freed by the act of the State from all public trusts, is in exactly the same predicament as the fast land on the adjoining shore, where undeniably the Light-

House Board could not erect a light-house without condemning and paying for its site. It is true that a State cannot grant any parcel of submerged land, however trifling, from the standpoint of the public interests, to a grantee, except subject to the power of Congress to appropriate it, if deemed necessary in the regulation of commerce and navigation. But when there is no longer a pre-existing easement of navigation in the whole body of the people to support the erection of a light-house as a mere aid to the enjoyment of the easement, involving in its erection no taking of anything in addition to what the public is already possessed of, the Federal Government can obtain title only in the ordinary way. The mere power to regulate commerce and navigation does not of itself, independently of any pre-existing easement of navigation in the people of a State, authorize Congress to take private property, whether submerged or fast land, without compensation. Many, indeed most regulations of commerce and navigation do not involve the taking of private property at all, but where they do, there is no difference as regards the necessity of condemnation and compensation between them and any other laws of Congress passed in the exercise of the various other powers, conferred upon the Federal Government, to the efficiency of which the occasional taking of private property is essential, such as the power to establish postoffices and postroads, etc.

It is settled that where the commercial power is unexercised, a State has the right itself to erect buoys and beacons required for the safe navigation of its harbors and rivers.

County of Mobile vs. Kimball, 102 U. S. 698.

Suppose the State of Maryland had erected the Hawkins Point Light-house, after granting its site to the plaintiff in error's predecessor in title, divested of all public trusts and easements. Could it for a moment be contended, if it had not condemned and paid for, or tendered payment for, the site, that it had acquired a valid title? And in what better position does the Federal Government stand? What has been devolved upon it by the Federal Consti-

tution is not the title to the public navigable waters and the soils under them, nor the trusts of navigation and fishery for the benefit of the people; but merely power to regulate commerce and navigation. This power cannot be exercised without regard to the special conditions created by a State in the exercise of its dominion over its own soil. If a State has not parted with a parcel of submerged land, it holds it subject to the trusts or easements of navigation and fishery in the people. As a highway for commerce the parcel and the waters above it are in the same situation as the bed of a public road, when the interest of the abutting owners in the land has been condemned and an easement of passage over it acquired by the public. Just as the public perhaps has the right under the latter circumstances to erect a lamp post in the bed of the road as an aid to travel, without further condemnation and compensation to the abutting owners, so where submerged land is still held by a State, subject to the trusts of navigation and fishery, the General Government, perhaps under the commercial power, has the right to erect a light-house on the submerged land as an aid to navigation, without condemnation and compensation. But when a State has granted to a citizen a parcel of submerged land that may afford foundation for wharves, piers, docks and other structures, or a parcel of submerged land which being occupied, does not substantially impair the public interest in the lands and waters remaining, the title thereto is vested in its grantee free from all public trusts or easements, and consequently there is no longer any easement to support the erection of a light-house on the land by the Light-House Board as a mere aid to the enjoyment of an existing servitude.

It is noteworthy that in a carefully prepared opinion, Attorney General Garland held in 1886, that the title to the Hawkins Point Light-House site was not in the United States, but in the plaintiff in error; and further used these words:

"The power to regulate navigation, however, would seem not to carry with it any such right in or to the soil under

navigable waters as to warrant its permanent and exclusive occupancy by the General Government for the purpose of establishing a light-house thereon without regard to or in derogation of the rights of ownership of the premises, that is to say, without obtaining a grant of the soil from the owner thereof or acquiring the same by condemnation, which contemplated making him just compensation therefor." (Record, pages 29-31.)

See also—Opinion of Acting Attorney General Phillips, 16 Ops. Atty. Gens., 369 and 370.

Section 69 of Article 75 of the Public General Laws of Maryland, provides that the plaintiff in an action of ejectment "shall also recover as damages in this action the mesne profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case."

It should be observed that the plaintiff in error is not only the owner of the site of the light-house, but also of the adjoining shore, (Record, page 8,) only two hundred and ten feet away. (Record, page 26). In addition, therefore, to his rights as the owner of the submerged land itself, he also has all the rights of a riparian proprietor.

The riparian right, said this Court in Yates vs. Milwaukee, 10 Wall, 497, "is a right of which, when once vested, the owner can only be deprived *in accordance with established law*, and if necessary that it be taken for the public good *upon due compensation.*"

To the same effect are the following cases:

Lyon vs. Fish Mongers Co., 1 App. Case, 662 L. R. 10, Ch. 679.

Delaplaine et al. vs. C. & N. Ry. Co., 42 Wis. 214.

In Maryland the whole subject is regulated by the following statutory provisions, (Pub. Gen. Laws of Maryland, Art. 54, sections 44, 45 and 46):

1862, Ch. 129.

"The proprietor of land bounding on any of the navigable waters of this State shall be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made by natural causes, or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

Ibid.

"The proprietor of land bounding on any of the navigable waters of this State shall be *entitled to the exclusive right* of making improvements into the waters in front of his said land; such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

Ibid.

"No patent hereafter issued out of the land office shall impair or affect the rights of the riparian proprietors, as explained and declared in the two preceding sections, and no patent shall hereafter issue for land covered by navigable waters."

These provisions were construed by the Court of Appeals of Maryland in the case of Goodsell vs. Lawson et al., 42 Md., pages 365, 366, where the proprietors of a tract of land lying contiguous to the waters of the Annamessex river, a navigable stream, had built piers and projected improvements of one sort or another into the water in front of their premises. The Court below, whose opinion was in express terms fully concurred in by the Court above, (page 369), said :

"Statutes, similar in their nature, though not so extensive in their operation, have been passed long before the Act of 1862, and have received constructions from the Courts, which

will much assist us in the present inquiry. The Act of 1745, ch. 9, in reference to the town, now City of Baltimore, declares, 'that all improvements of what kind soever, either wharves, houses or other buildings, that have or shall be made out of the water, or where it usually flows, shall, as an encouragement to such improvers, be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever.' In speaking of the rights conferred by that Act, the Court of Appeals says: "the right of extending her lot, or wharfing out to the city dock, under Act of 1745, and the ordinances of the City of Baltimore, *was a franchise, a vested right, peculiar in its nature—a quasi property, of which the lessor of the plaintiff could not lawfully be deprived, without her consent.* And if any other person, without her authority, made such extension, *no interest or estate in the improvement vested in the improver, but it became the property and estate of the owner of the franchise.*" (Casey's Lessee vs. Inloes, 1 Gill, 501.) In the same way, on page 500, they say, *that the Act of the improver was a mere trespass.*

It cannot be that the riparian rights conferred by the Act of 1862, are not at least as extensive as those arising under the Act of 1745, as expounded by the Court of Appeals. But the affirmative right, given by the former Act, is further protected by the provision in the 39th section, that 'no patent shall hereafter issue for land covered by navigable waters,' that no patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors, &c." *The complainants in this cause, then, as owners of the tract of land called* 'Honesty,' *have the exclusive right to make improvements into the waters of the Annamessex river, in front of their said land. This is a vested right, a quasi property, of which they cannot be lawfully deprived without their consent; and if any other person make such improvement without their authority, such person is a trespasser, and the improvement becomes the property of the owner of the adjacent land.*"

In a later case, B. & O. R. R. Co. vs. Chase, et al., 43 Md. 35, the Court of Appeals of Maryland, said, "*These riparian rights, founded on* the common law are property, and are

valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation. (Yates vs. Milwaukee, 10 Wall, 105.)"

How completely prior to the prohibition in the Act of 1862 against the issuance of patents for lands covered by navigable waters, the grantee of the State could assert his dominion over such lands, is revealed in the remark of the Court in Goodsell vs. Lawson et al., *supra*, page 364: "Previously (to the Act of 1862) a person's (riparian proprietor's) right to the accretion or even to make improvement under laws then existing, might be practically destroyed by a grant from the State for the land covered by the water adjacent to his premises."

In none of the cases relied upon by the Government below, with the exception of Stockton vs. Balt. & N. Y. R. Co., 32 Fed. Rep. 19, was it held that the Government can erect an aid to navigation in navigable waters without condemnation and compensation. And in the exceptional case mentioned the distinction enounced in the Illinois Central Case was distinctly prefigured. After remarking that the title to its submerged lands was in the State of New Jersey in trust for the public uses of navigation and fishery and the erection thereon of wharves, piers, light-houses and beacons, Mr. Justice Bradley added: "*it is also true that portions of the submerged shoals and flats which really interferred with navigation and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose, but neither did these dispositions of useless parts affect the character of the title to the remander.*"

In conclusion it is respectfully submitted that the judgment below should be reversed and the cause remanded.

W. CABELL BRUCE,

Attorney for Plaintiff in Error.

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JAMES H. McKENNEY,
CLERK

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

TERM No. [illegible] OCTOBER TERM, 1895.

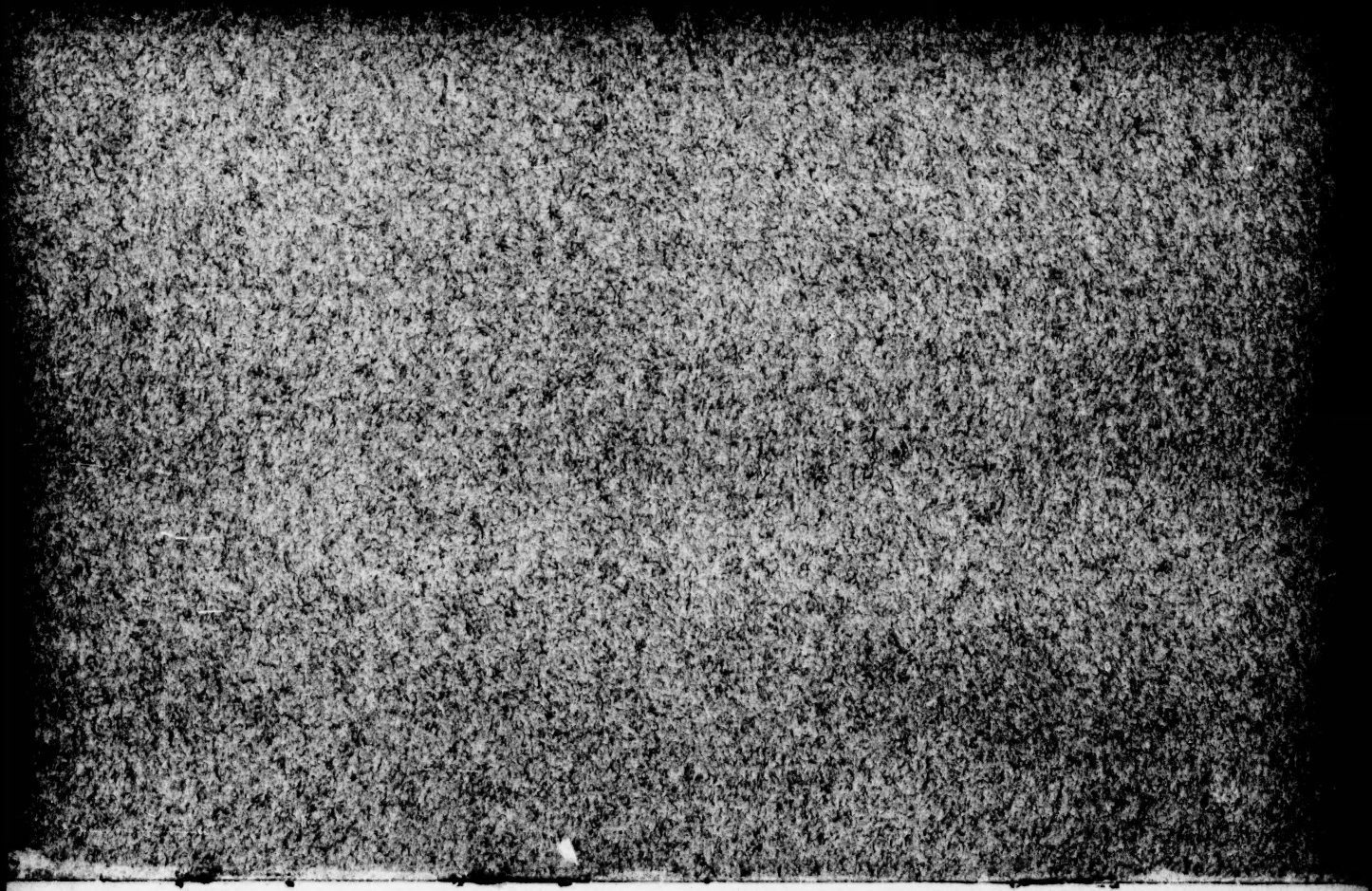
THOMAS C. CHAPPELL, *Plaintiff in Error.*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

BRIEF FOR THE PLAINTIFF IN ERROR.

THOMAS C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.



IN THE

Supreme Court of the United States.

TERM No. 321. OCTOBER TERM, 1892.

THOMAS C. CHAPPELL, *Plaintiff in Error.*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

On December 23d, 1887, the plaintiff in error brought an action of ejectment against the defendant in error in the Circuit Court for Anne Arundel county in the State of Maryland. (Record, page 1.) The defendant in error removed the case to the Circuit Court of the United States for the District of Maryland. Afterwards, the plaintiff in error filed in the Circuit Court of the United States for the District of Maryland, an answer to the petition for removal, and three exhibits, marked Nos. 1, 2 and 3; and three exhibits, marked A, B and C. (Record, pages 7-24.) Afterwards, the defendant in error moved the Court to require the plaintiff in error to withdraw said answer, (Record, page 24) which said motion the Court granted, (Record, page 24,) to which said ruling the plaintiff in error excepted, (Record, page 37.) Afterwards, the plaintiff in error filed a motion to remand the above cause, (Record, page 24,) which said motion plaintiff in error afterwards withdrew, (Record, page

25.) Subsequently plaintiff in error filed an exception to the jurisdiction and a motion to remand, together with the copy of Attorney General Garland's opinion as to the title of the land in controversy in this cause, and a map of the United States Coast Survey of Patapsco river and Baltimore harbor, (Record, pages 27–31,) which said motion the Court refused. (Record, page 21.) Exception taken. (Record, page 37.) The plaintiff in error moved to amend his answer to the petition for removal, (Record, pages 31–32,) which said motion the Court refused. Exception taken. (Record, page 38.)

The object of the action was to recover five acres of land, partially dry and partially submerged, described by a circle, the centre of which was the centre of Hawkins Point lighthouse, and having a radius of 263 3-10 feet, lying partially upon the bank and partially under the waters of the Patapsco river, near the city of Baltimore; and also a strip of land appurtenant thereto, lying between the said lighthouse and the Brewerton channel, in the Patapsco river, and to obtain mesne profits to the amount of $33,333.33 1-3. The defendant in error is the keeper of the Hawkins Point lighthouse, which had been erected on the land in 1868 by the Federal Lighthouse Board, out of moneys drawn from the Treasury, under an Act of Congress appropriating $30,000, "for the establishment of a beacon light to mark Brewerton channel, Patapsco river." (Section 4658, R. S., Act 28, July, 1866, 14 S. L., 313.)

The lighthouse is one of the range lights erected in the aid of navigation over the Brewerton channel, the main channel leading to the port of Baltimore from the Chesapeake Bay, for the proper view of which it is necessary to keep a strip of a certain width free from obstructions to the vision, between the said channel and the rear light of said range. The defendant in error filed a plea to the declaration in the United States Circuit Court, in which he disclaimed and refused to defend as to all land described in said declaration, except so much as was used as a site for the lighthouse, or an area of about 27 square feet, and

averred that this latter area was then and had been since the year 1868, in the possession of the United States as the site of the Hawkins Point Light Station, (Record, pages 25-26); to which said plea the plaintiff in error demurred, (Record, page 32,) and the defendant in error joined issue on the demurrer, (Record, page 32,) and the Court overruled said demurrer. (Record, page 32.) To this plea the ~~defendant~~ plaintiff in error replied that when possession was taken in 1868, of the portion of said land described in said plea as and for the site of Hawkins Point Light Station, the said land was held and owned in fee simple by a certain John M. Johnson, under a good and sufficient patent to him therefor, from the State of Maryland, dated July 2d, 1861, and that such possession was taken as in said plea alleged, without any grant of any kind from said Johnson, and that no compensation had ever been paid or tendered to him for said land or for the use thereof, or for any easement therein, nor had any deed or grant of any kind ever been made by him to any person whatsoever, for said land, or of any interest, right or easement therein. (Record, pages 32-33.) To this replication the defendant in error demurred, (Record, page 34,) and the Court sustained the demurrer and entered up judgment thereon. (Record, page 36.)

Specification of Errors.

The Court below erred in overruling the demurrer of the plaintiff in error, because the Government could not acquire any title to the land in question by mere seizure of the same, and expending thereon money drawn from the treasury of the United States by an Act of Congress; and erred in sustaining the demurrer of the defendant in error:

1. Because, while it is true that, taken as a whole, all the public navigable waters, and the soils under them, are vested in the several States, in trust for the public uses of navigation and fishery, still the several States have the right to use or dispose of any portion thereof when that can be done without substantial impairment of the interest of the public in the waters and in aid of commerce, and when so granted are freed from such trusts.

2. Because, when a patent has been issued to a citizen by a State for land under such waters, such patent must be presumed, until the contrary is shown, to grant portions of the whole that can be granted without substantial impairment of the interest of the public in the waters.

3. Because, when such patent is issued, if the presumption mentioned is not overthrown, the effect of the patent is to pass an absolute and unqualified fee simple title, wholly free from the trusts of navigation and fishery, to the State's grantee, and consequently such a title as cannot be taken by the Federal Government under the commercial or any other power without paying for it.

4. Because the Act of the Legislature of a State authorizing the adjacent or riparian proprietor to make improvements in front of his property and to build wharves and piers and to reclaim land from the water, is a measure in aid of commerce and for the benefit of the whole people of the State, and is not repugnent to any bill of rights or Constitution of the State or to the Constitution of the United States; and said Act gives the riparian proprietor exclusive rights, privileges and advantages, of which he can only be deprived by due process of law and upon just compensation.

Argument.

Authority can hardly be required for the proposition that the Court below had no jurisdiction over that portion of the land described in the declaration, which was dry land. Therefore the Court should have remanded the case to the Circuit Court for Anne Arundel county. "Since the Court cannot try the whole case it must remand the whole. It cannot retain a part and remand a part." 4th Fed. Rep. page 346. "If it is desired to contradict the allegation in the petition for removal, an answer or a plea in abatement to the petition should be filed in the Federal Court." (Federal Judiciary Acts of 1875 and 1887, annotated by Roger Foster and cases cited, page 42.) "Where the State Court has ordered the removal improperly, the Circuit Court should remand the suit." Dillon, Removal of Causes, sec. 87. Ibid., sec. 89. "If the case be improperly removed in the Circuit Court, and it enter-

tains jurisdiction in the case, in which, by law, it can have none, its judgment will be reversed by the Supreme Court, with the direction to the Circuit Court to remove the same to the State Court, whence it was improperly taken."

See also Knobbs vs. R. R. Co., 20 Wall. 117.

It is obvious to this honorable Court that the disclaimer of the defendant in error as to the dry land, and the refusal of the defendant in error to defend as to the dry land, should have been filed in the Circuit Court for Anne Arundel county, and the judgment thereon entered for the plaintiff in error in the Circuit Court before removal; and also a judgment for the plaintiff in error should have been entered in the lower Court as to the submerged land, which the defendant in error refused to defend and disclaimed. "But any defendant may refuse to appear or file a disclaimer of title to the land or any part thereof, in which case the plaintiff shall recover judgment against the defendant so disclaiming or refusing to defend for the land, or so much thereof as shall not be defended, but the costs shall be subject to the discretion of the Court, and the trial shall then proceed against the party making the defence under the rules and practice of the Court as the same existed prior to the year 1870, except so far as the same are changed by this article; and the plaintiff shall also recover as damages in this action the mesne profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case."

Pub. Gen. Laws of Md., Vol. 2nd, Art. 75, section 69, page 1128, title Ejectment.

It is obvious that if the United States Circuit Court had jurisdiction over all of the submerged land described in the declaration, said Court should have entered judgment for the plaintiff in error for the submerged land which the defendant in error disclaimed and refused to defend. "The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at

common law in the courts of the United States, in cases where they apply." (Revised Statutes U. S. Sec. 721.) "Not only the site of the Hawkins Point Light-House is in controversy in this case, but the question of the right of the Government to have an easement over the submerged land of the plaintiff in error, described in the declaration, is also involved. The said easement is the taking of the property of the plaintiff in error, and the Secretary of the Treasury ordered the condemnation of the said easement over the submerged land of the plaintiff in error, as well as over the dry land, of a strip 60 feet wide and 5,650 feet in length, but only about 1,700 feet of the length of said strip is dry land, and the said easement over said dry land only has been condemned, the United States District Attorney claiming a right of user in the submerged land for the United States. (Record page 23.)

There is no other way in which the question as to the right of the United States to use the submerged land of said plaintiff in error for said easement without due process of law and without just compensation, can be raised, except by this case, so that the question involved in this case is not only the site of the Hawkins Point Light-House, but the strip of submerged land 60 feet wide and nearly 4,000 feet long.

It is definitely settled that such a user by the United States is an easement for which the plaintiff is entitled to just compensation. (Chappell vs. United States, 34 Fed. Rep. 673.)

The only question that remains is whether the title of the plaintiff in error to the submerged land, which is admitted (Record page 23) is the same as his title to the dry land. "The planting of oysters in the soil covered by water owned in common by the people of the State is not different in practice from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit, and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry land,

we see no reason why it may not do the same thing in respect to such as are covered by water." (McCready vs. Va., 94 U. S., 391.)

The Court of Appeals of Maryland, when called upon to declare the nature and title of the State and its grantees in the land at the bottom of navigable streams, has uniformly held that when authorized by the Legislature or by an express grant from the State, the grantee acquires rights, privileges and advantages entirely private and exclusive in their nature.

In the case of Day vs. Day, 22 Md. 537, cited in the opinion of the Court below, in the paragraph following that cited by the Court, the Court of Appeals of Maryland expressly recognizes the exclusive right of the grantee of the State to the use of such lands. "The owners of adjacent ground had no exclusive right to such lands, nor could any exclusive right to their use be acquired *otherwise than by an express grant from the State.*" The plaintiff in error holds such an express grant from the State to the land described in this declaration, and occupied as a site for Hawkins Point Light, and is therefore entitled to the exclusive use thereof, until deprived by due process of law and upon just compensation by the United States by such power to exercise the right of eminent domain as it possesses.

In the case of Phipps et al. vs. State, the Court of Appeals held that the authority conferred by the Legislature to erect wharves conferred privileges and advantages wholly exclusive in their character. "The power of the Legislature to authorize the erection of wharves and the reclaimation of the land from the water, has never been questioned, notwithstanding the effect has been to confer privileges and advantages wholly private and exclusive in their character." (22 Md., page 389.)

"Interests of the people in the navigation of waters and in the commerce of them, may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of

the submerged land; and so long as their disposition is made for such purpose, no valid objection can be made to the grants." (Ill. Cent. R. R. vs. Ill., 146 U. S. 387.) The Legislature of Maryland has given to the adjacent proprietor since the Act of 1862, chapter 129, Public General Laws of Maryland, Code of 1888, Article 54, sections 44, 45, the exclusive right of making improvements of the waters in front of said land. (Edmonson Island Case, 42 Federal Rep. 15.) It is evident from this last mentioned case that the plaintiff in error has a perfect right to extend his walls and reclaim the land occupied by the lighthouse. Upon what theory then can it be contended that the United States has any more right to take private property for the purpose of a lighthouse under the power "to regulate commerce," than it would have to take private property for the purpose of a post office under the power "to establish post offices and post roads?" The occupation of the property of the plaintiff in error for the site of the lighthouse and the occupation of his said property lying between said lighthouse and the limits of his grant, and between the limits of his grant and the channel of the river, by the transmission of rays over a strip thereof, at least 60 feet wide, which must be kept clear to give an unobstructed view of said light over said space, is a user by the Government for which the plaintiff in error is entitled to compensation; and the same not having been acquired by due process of law or upon any compensation whatever, either to said plaintiff in error or his predecessor in title, or to any other person, the plaintiff in error is entitled to recover in this suit.

The case of Brown vs. Kenedy, 5th H. & J., decided in 1821, does not bear out the construction given it by the lower Court. On the contrary, that case expressly decides that the King of England made an absolute grant to the Lord Proprietary of a navigable stream, and the Lord Proprietary made an absolute grant of said stream to Charles Carroll of Annapolis, and that a conveyance of Charles Carroll of Carrollton, the heir-at-law of Charles Carroll of Annapolis, to one Lawson, for the land on one side of said

stream, and to one Lyon, for the land on the opposite side of said stream, both of which conveyances call for the stream; that these grants carried the property to the middle of said stream as appurtenant. And the language in said case, that the King might dispose of said land "sub modo" was an *obiter dicta* only, and in the said case the middle of the stream having become dry land, it was held that it went to the grantees of Charles Carroll of Carrollton, in fee, discharged of all easements and trusts, notwithstanding it was not described in the grant. The King was empowered to make absolute grants of submerged property. "Subjects are capable of a property in the sea." (Selden's Mare Clausum, Liber 1, Cap. 15, page 60.)

In the case of Phipps et al vs. State, heretofore cited, 22nd Md. 380, the Court went still further and held that the State might authorize private property being acquired in submerged land.

In the case of Day vs. Day. 22nd Md. 537, before cited, the Court expressly recognizes the private character of title in such lands under an express grant from the State. The Lakeshore case, present term, leaves no question as to such grants for parcels of submerged land which it is proper for a State to grant.

The right of wharfage itself in such lands is property, and if taken must be paid for. "Water front on streams is property, and if taken must be paid for as such. So with the exclusive right of wharfage upon tide water." (Cooley's Con. Limitations, 5th edition, page 675-6.) "The erection of a structure outside of a wharf, which will prevent the access to, and use of, the wharf, as such, by vessels, is the taking of the wharf, to which the owner is entitled to compensation." (Crocker vs. Mayor of New York, 15th Rep. 135.)

The lower Court, both in the present case and in the Edmondson Island case, has confused the powers of the United States to use private property for public uses with the powers of the King of England. "It is clearly agreed that the King only has a prerogative in beacons and light-

houses, and that he may erect any such, and in such places as will be most convenient for the safety of ships, mariners and navigation. Also it seems a better opinion that being for the public utility, and one of prerogative, which he is entrusted with for the safety of the whole realm, he may erect such beacons, etc., as well in the soil or ground of the subject as that of the Crown; and that he may do this without the subject's consent." (8th Bacon's Abridgement, title Prerogative, page 33.) But it cannot be contended that the Government of the United States of America has a right to take the ground of a subject contrary to the provisions of the Constitution of the United States, and the demurrer of the plaintiff in error to the plea of the defendant in error ought to have been sustained. "In all cases, civil and criminal, in which any or either party shall demur to any indictment, declaration, plea, replication, rejoinder, sur-rejoinder, or other plea of any description, of the opposite party, and the said demurrer shall be overruled, the party demurring shall have the right to plead over to the facts of the case by way of traverse or otherwise, without withdrawing his demurrer, and upon appeal or writ of error, shall have the questions of law arising upon the demurrer decided and determined, as fully to every intent as if the party demurring had not pleaded over." (Pub. Gen. Laws of Md., Vol. 2, Art. 75, section 8, page 1093.)

The demurrer of the plaintiff in error having been overruled, he was entitled to judgment upon his plea. The Act of the Legislature of the State of Md., Art. 54, sections 44-45, Pub. Gen. Laws of Md., page 912, which the Circuit Court of the United States for the District of Maryland has construed in the Edmondson Island case, 42 Fed. Rep. 15, is an Act for the benefit of commerce and navigation, and for the interests of the people of the State and the United States therein. For it is evident that unless vessels have wharves to lay to they can neither be properly laden nor their cargoes discharged, and therefore without wharves there could be no such thing as commerce by navigation. It is also evident that unless the riparian proprietor be

entitled to the exclusive rights, privileges and advantages in the said wharves when built, that no such proprietor would engage in the construction of such costly structures as wharves, docks and piers. It is also evident that property on water front has a value exceeding many times the value of adjacent property back from the water, and that this excess of value is due entirely to the *right of wharfage* and that therefore *this right* of wharfage is a franchise, and is property, and is valuable, whether the wharf has been constructed or not, and if destroyed or impaired or taken for public use must be paid for. It should be observed that the plaintiff in error ~~was~~ is not only the owner of the site of the light-house and the land described in the patent to John M. Johnson, but also of the adjacent shore. (Record page 8.) In addition, therefore, to his right as a holder of submerged land itself, he also has the right of a riparian proprietor. "The riparian right is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for public good, upon due compensation."

Yates vs. Milwaukee, 10 Wall. 497.

So that the plaintiff in error is entitled to compensation for the impairment, diminution or destruction of this right.

See also---Lyon vs. Fishmonger Co., 1 App. Cas. 662, L. R. 10, ch. 679.

Delaplaine et al. vs. C. & N. W. Ry. Co. 42 Wis. 214.

The map of the United States Coast Survey, chart No. 384, of the Patapsco river and Baltimore harbor, (Record, pages 28-29,) filed as an exhibit in this case, shows that the land described in the declaration is land suitable for the erection of wharves, piers and docks in aid of commerce and navigation. The charts B and C, (Record, pages 22-23,) show there is a manufactory now on the adjacent land.

Authority is hardly needed for the proposition that after the Revolution the several States became vested with the ownership of all their navigable waters and the soils under

them, or for the further proposition that the same were not granted by the Federal Constitution to the United States, but were reserved by the several States themselves.

Martin et al. vs. Waddell, 16 Peters, 410.
Pollard, Lessee, vs. Hagan, 3 How. 212.
Good Title vs. Kibble, 9 How. 471.
Doe vs. New Jersey, 15 How. 432.
Munford vs. Harbor Com's, 18 Wall. 57.
Ill. Cent. R. R. Co. vs. Ill., 146 U. S. 435.

Neither can it be controverted that the State can make an absolute and unqualified grant for such portion of the soil under navigable waters as it is for the interests of the people for the State to grant, since the decision of this Court in the recent case of the Illinois Cent. R. R. Co. vs. Illinois, 146 U. S. 387.

This Court said in that case (pages 452-453):

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *The interest of the people in the navigation of the waters and in commerce over them, may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundations for wharves, piers, docks and other structures*

in aid of commerce, and grants of parcels, which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purpose of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.* General language sometimes found in the opinions of the Courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, *must be read and construed with reference to the special facts of the particular cases.* A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and con-

trol of private parties, except in the instance of parcels mentioned for improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

Here we have repeated declarations of the clearest description to the effect that grants by the State of parcels of lands under navigable waters that may afford foundation for wharves, piers and docks and other structures in aid of commerce, or grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, may be made to individuals wholly free from the control which the State has for the purposes of the trusts of navigation and fishery, and wholly free from the trusts themselves. The effect of such a grant is to vest in the grantee an absolute, unqualified fee simple title, and a right, privilege and franchise entirely private and exclusive in its character, of which, said grantee can only be deprived by due process of law, and if it be taken for public use, upon due compensation.

The State having issued a patent to the predecessor in title of the plaintiff in error, this patent furnishes presumptive evidence of its own regularity and validity, and must be assumed, until the presumption is overturned, to have been issued for a parcel of one or the other of the two classes of land under navigable waters that it is competent for a State to grant free from the trusts of navigation and fishery.

Jackson vs. Marsh, 6 Cow. 281.
People vs. Mauvan, 5 Den. 389.
United States vs. Stone, 2 Wall. 525, 535,

The Attorney General of the United States, Hon. A. H. Garland, and the United States District Attorney for the District of Maryland, both passed upon the patent in this case and found it a valid patent. The only questions in this case then are whether the issuing of this patent by the

State, and whether the Act of the Legislature of the State of Maryland giving riparian owners the exclusive right to construct wharves, piers and docks in front of their fast land, are the exercise of powers repugnant to the Constitution of the State or to the United States.

The patent is not for land lying in the channel of the Patapsco river. "The channel of a river is that portion through which the greatest body of water flows." (St. Louis & St. Paul Packet Co. vs. Keokuk & Hamilton Bridge Co., 30 Fed. Rep. page 755.) But it is for the land lying on the shores of the Patapsco river. "The shores of navigable rivers and the soils under them were not granted by the Constitution to the United States but were reserved by the States respectively."

Pollard's Lessee vs. Hagan et al., 3 How. p. 230.
17th Peters, 155.
13th Howard, 25.
1st Howard, 95.
16th Peters, 224 and 261.
18 Howard, 71.

Patents for submerged land are not repugnant to the Constitution of the State of Maryland, and are valid. (See 1st Gill, 512.) This Court says in the case of Pollard's Lessee vs. Hagan et al. 3 Howard 212: "In Maryland, South Carolina and Georgia, valuable property has thus been reclaimed from water."

It follows that if the patent conveyed submerged land, that the State could convey to the plaintiff in error's predecessor in title, the Federal Government cannot take this land without making due compensation to the plaintiff in error. "A grantee may support a suit in ejectment upon the title of his predecessor in title." (Poe P. & P.) It (the submerged land) when freed by the act of the State from all public trusts and easements is in exactly the same predicament as the fast land on the adjoining shore, where, undeniably, the Light-House Board could not erect a light-house without condemning and paying for its site. The mere

power to regulate commerce and navigation does not of itself authorize Congress to seize property, whether submerged or fast land, without compensation, if the citizen has a private right, privilege or franchise therein. Many, indeed most regulations of commerce and navigation, do not involve the taking of private property at all, but where they do there is no difference as regards the necessity of condemnation and compensation between them and any other laws of Congress passed in the exercise of the various other powers conferred upon the Federal Government, to the efficiency of which the occasional taking of private property is essential, such as the power to build postoffices, etc.

It is settled that where the commercial power is unexercised, the State has the right itself to erect bouys and beacons required for the safe navigation of its harbors and rivers.

County of Mobile vs. Kimball 102 U. S. 698.

Suppose the State of Maryland had erected the Hawkins Point Light-house, after granting its site to the plaintiff in error's predecessor in title, divested of all public trusts and easements—could it for a moment be contended, if it had not condemned and paid for, or tendered payment for, the site, that it had acquired a valid title? And in what better position does the Federal Government stand? Its position is not as good as that of the State, for by the constitution and laws of the United States it is required to obtain the consent of the State. (Constitution of U. S., Art. 1st, section 8, clause 17. R. S. U. S. 355.) What has been devolved upon it by the Federal Constitution is not the title to the public navigable waters and the soils under them, nor the trusts of navigation and fishery, for the benefit of the people, but merely the power to regulate commerce and navigation.

If a State has given a citizen the exclusive right of wharfage, by an Act of its Legislature, or has made an express grant for submerged land suitable for foundations for wharves, docks and piers and other structures in the aid of commerce, he cannot be deprived of the possession of the

same except by due process of law, and upon just compensation. (5, 14th and 15th Amendments of the Constitution of U. S.)

It is noteworthy that in a carefully prepared opinion, Attorney General Garland held in 1886 that the title to the Hawkins Point Light-House site was not in the United States but in the plaintiff in error, and further used these words:

"The power to regulate navigation, however, would seem not to carry with it any such right in or to the soil under navigable waters as to warrant its permanent and exclusive occupancy by the General Government for the purpose of establishing a light-house thereon without regard to or in derogation of the rights and ownership of the premises; that is to say, without obtaining a grant of the soil from the owner thereof or acquiring the same by condemnation which contemplated making him just compensation therefor." (Record pages 29-31.)

See also—Opinion of Acting Attorney General Phillips. 16 Ops. Atty. Genls. 369 & 370.

Section 69 of Art. 75 of the Public General Laws of Maryland, provide that the plaintiff in an action of ejectment "shall also recover as damages in this action the mesne profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case."

The following statutory provisions, Pub. Gen. Laws of Maryland, Art. 54, sections 44, 45 and 46, page 912, are the codification of the Act of 1862, Ch. 129.

"The proprietor of land bounding on any of the navigable waters of this State shall be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made by natural causes, or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable." (Ibid.)

Ibid

"The proprietor of land bounding on any of the navigable waters of this State, shall be *entitled to the exclusive right* of making improvements into the waters in front of his said land; such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be made as to interfere with the navigation of the stream of water into which the said improvement is made." ~~(1862, ch. 120.)~~

"No patent hereafter issued out of the land office shall impair or affect the rights of the riparian proprietors, as explained and declared in the two preceding sections, and no patent shall hereafter issue for land covered by navigable waters."

The Act itself provides that the wharves, piers and docks may be extended such a distance into the stream that any vessel that sails the stream may come thereto; in other words, to the channel.

These provisions were construed by the Court of Appeals of Maryland in the case of Goodsell vs. Lawson et al., 42 Md., pages 365, 366, where the proprietors of a tract of land lying contiguous to the waters of the Annamessex river, a navigable stream, had built piers and projected improvements of one sort or another into the water in front of their premises. The Court below, whose opinion was in express terms fully concurred in by the Court above, (page 369) said:

"Statutes, similar in their nature, though not so extensive in their operation, have been passed long before the Act of 1862, and have received constructions from the Courts, which will much assist us in the present inquiry. The Act of 1745, chapter 9, in reference to the town, now city, of Baltimore, declares, 'that all improvements of what kind soever, either wharves, houses or other buildings, that have or shall be made out of the water, or where it usually flows, shall, as an encouragement to such improvers, be forever deemed the right, title and inheritance of such improvers,

their heirs and assigns, forever.' In speaking of the rights conferred by that Act, the Court of Appeals say 'the right of extending her lot or wharfing out to the City dock, under Act of 1745, and the ordinances of the city of Baltimore, *was a franchise, a vested right, peculiar in its nature—a quasi property of which the lessor of the plaintiff could not lawfully be deprived, without her consent.* And if any other person, without her authority, made such extension, *no interest or estate in the improvement vested in the improver, but it became the property and estate of the owner of the franchise.*' (Casey's Lessee vs. Inloes, 1 Gill, 501). In the same case, on page 500, they say *that the act of the improver was a mere trespass.*

It cannot be that the riparian rights conferred by the Act of 1862, are not at least as extensive as those arising under the Act of 1745, as expounded by the Court of Appeals. But the affirmative right, given by the former Act, is further protected by the provision in the 39th section, that 'no patent shall hereafter issue for land covered by navigable waters,' and that no patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors, &c. *The complainants in this cause, then, as owners of the tract of land called 'Honesty' have the exclusive right to make improvements into the waters of the Annamessex river, in front of their said land. This is a vested right, a quasi property, of which they cannot be lawfully deprived without their consent; and if any other person make such improvement without their authority, such person is a trespasser, and the improvement becomes the property of the owner of the adjacent land.*"

In a later case, B. & O. R. R. Co. vs. Chase et al., 43 Md. 35, the Court of Appeals of Maryland said: "*These riparian rights founded on* the common law are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired. They are rights of which, when once vested the owner, can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use upon due compensation. (Yates vs. Milwaukee, 10 Wall. 504)."

How completely prior to the prohibition in the Act of 1862, against the issuance of patents for lands covered by navigable waters, the grantee of the State could assert his dominion over such lands, is revealed in the remark of the Court in Goodsell vs. Lawson et al., *supra*, page 364: "Previously (to the Act of 1862) a person's (riparian proprietor's) right to the accretion or even to make improvement under laws then existing, might be practically destroyed by a grant from the State for the land covered by the water adjacent to his premises."

In none of the cases relied upon by the Government below, with the exception of Stockton vs. Balt. & N. Y. R. R. Co., 32 Fed. Rep. 19, was it held that the Government can erect an aid to navigation in navigable waters without condemnation and compensation. And in the exceptional case mentioned, the distinction enounced in the Illinois Central case, was distinctly prefigured. After remarking that the title to its submerged lands was in the State of New Jersey in trust for the public uses of navigation and fishery and the erection thereon of wharves, piers, light-houses and beacons, Mr. Justice Bradley added: "It is also true that portions of the submerged shoals and flats which really interfered with navigation and could better subserve the purpose of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose, but neither did these dispositions of useless parts affect the character of the title to the remainder."

If the State of Maryland had made no grant for the submerged land in question, and had conferred no franchise to riparian proprietors, of a private nature, it is evident that even under that situation of affairs the United States could not appropriate the public lands of the State without the consent of the State.

"The question whether vacant lands within the United States became the joint property or belonged to the separate States, was a momentous question, which at one time threatened to shake the American Confederacy to its foundation.

This important contest has been compromised, and the compromise is not now to be disturbed."

Fletcher vs. Peck, 6 Cranch's Reports 87, Marshall C. J.

Constitution U. S., Art. 1st, section 8, clause 17.

Where the State has made a grant and conferred a franchise, right and privilege, entirely private and exclusive in its character, it is impossible to contend that the United States may seize the same or any portion thereof. (4th Amendment Constitution of the United States.) The learned Chief Justice Marshall, in the case of Fletcher vs. Peck, 6 Cranch's Reports 87, says: "That the Legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits in such a manner as its own judgment shall dictate, is a proposition not to be controverted." This rule will apply to the submerged lands as well as to the fast lands; and unless it be shown that the grant embraces such lands as the State should not grant, and unless it is shown that the franchise, right and privilege is such a franchise, right and privilege that the State ought not to confer, and one which would interfere with the regulation of commerce, such a grant and such a privilege confers property entirely private and exclusive in its character. How can it be contended that a State cannot make such a grant or confer such a franchise, since the decision of this Court in the case of Ill. Cent. R. R. vs. Ill., in which such grants and such franchises are expressly approved and sanctioned?

On page 218, in the case of Pollard's Lessee vs. Hagan et al., 8 Howard, this Court says: "The seashore and the arms of the sea, like other public property, may be granted by the King to individual proprietors." (2 Dane's Abr. 690, 691.)

The officers of the Light-House Board erected the Hawkins Point Light without complying with section 355, R. S. U. S.

The plaintiff in error is entitled to recover against the defendant in error, even if he be a United States officer.

Meigs vs. McClung's Lessee, 9 Cranch's Reports, 11.

United States vs. Lee, 106 U. S., page 215.

In conclusion it is respectfully submitted that the judgment should be for the plaintiff in error for all of the submerged land described in the declaration, which the defendant in error disclaimed and refused to defend; and also for that occupied as a site for the Hawkins Point Light-House, and that the judgment of the lower Court be reversed and the cause remanded.

THOMAS C. CHAPPELL,

Plaintiff in Error and Solicitor in Person.

[illegible] Supreme Court of the United [illegible]

October Term, 1905. 4

THOMAS C. CHEATHAM, PLAINTIFF IN ERROR,
vs.
JAMES M. WATERWORTH.

[illegible]

[illegible]

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THOMAS C. CHAPPELL, PLAINTIFF in error,
vs.
JAMES M. WATERWORTH.
} No. 82.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This was an action in ejectment brought by the plaintiff in error. The defendant in error, who was the defendant below, filed a plea, in which he avers that the land described in the declaration, with the exception of one-quarter acre of fast land, as to which he denies possession and disclaims title and interest,

> is now, and always has been, submerged land at the bottom of the Patapsco River, the same being one of the navigable rivers of the United States; * * * that the only portion of said submerged land which has been or is now in his possession is that portion

used as a site for Hawkins Point light station, and embraces so much of said submerged land as is necessary to hold and support nine iron piles, 18 inches in diameter, on which piles, at the distance of 12 feet above mean high tide, the wooden superstructure of the said light station is placed; the said wooden superstructure, resting upon said piles, being a square area 27 feet square; the center pile of the said nine piles is at the center of the said square superstructure and is situated at a point distant * * * from the ordinary high-water mark of the adjacent shore 210 feet, more or less; that the said portion of submerged land is now, and has been since the year 1868, in the possession of the United States as the site of Hawkins Point light station, the same being built in said year by the Light-House Board of the United States, under the authority and by direction of the Congress of the United States, and is now, and ever has been, one of the range lights of the Brewerton Channel of the Patapsco River, and is now, and ever has been, used as a light to aid in the navigation of said river; that on February 20, 1877, the State of Maryland, by deed executed in conformity to law, ceded to the United States jurisdiction over said site; and that the defendant is now, and has been since 1882, in possession of said site, for and on behalf of the United States, by appointment of the Secretary of the Treasury of the United States, as the keeper of said light-house station. (Second amended plea, Record, 25, 26.)

The following is the act of Maryland, of 1874, chap. 193, sec. 2, Code of 1888, Art. 96, sec. 2, under which her deed of cession was made to the United States:

With respect to land covered by the navigable waters within the limits of the State, and on which

> a light-house, beacon, or other aid to navigation has been built, or is about to be built, the governor of the State, on application of an authorized agent of the United States, setting forth a description of the site required, is authorized and empowered to convey the title to the United States, and to cede jurisdiction over the same; provided, no single tract shall contain more than five acres.

The plaintiff filed a replication, in which he avers that when possession was taken in 1868 of the portion of submerged land described in the plea, as and for the site of the Hawkins Point light station, said land was held and owned in fee simple by one John M. Johnston, under a good and sufficient patent to him therefor from the State of Maryland, dated July 2, 1861; that the plaintiff succeeded to Johnston's title, and that said possession was taken, as in the plea alleged, without any grant of any kind from the said Johnston, and without any compensation being paid or tendered to him, or to the plaintiff since, for said land, or for any use of or easement in the same. (Record, 32.)

The defendant demurred to the replication; the demurrer was sustained, and judgment was rendered thereon for the defendant. (Record 36, 37.)

Brewerton Channel is the only approach for vessels of large draft to the port of Baltimore. The natural depth of the water in the channel was about 16 feet, but it has been deepened to over 27 feet, for the purpose of admitting large class ocean steamers, and is kept dredged out, buoyed, and lighted by the constant supervision of the proper authorities of the United States, with appropria-

tions made by Congress. The Hawkins Point light-house was required and is used as an aid to the safe navigation of the channel by ships engaged in foreign commerce. The court will take judicial notice of these facts. They are recited in the opinion of the circuit judge (Record, 34). The light-house was built under the appropriation act of July 28, 1866, chapter 296, which made an appropriation (14 Stat., 313) of $30,000 "for the establishment of beacon lights to mark Brewerton Channel, Patapsco River, Maryland." The case below is reported in 39 Fed. Rep., 77.

ARGUMENT.

It was held by the circuit court, and it is respectfully submitted here, that the Government was entitled to establish and maintain this light-house and to attach its superstructure to the bed of the river, as was done, without making compensation to the plaintiff. We admit that the title to the bed of the Patapsco River was in the King prior to the Declaration of Independence, and that it passed at that time to the State of Maryland. But we claim that upon the adoption of the Constitution the United States acquired the right to use the river, as Congress might see fit, for the improvement and protection of its navigation; that this right included authority to attach light-houses to the bed of the river as appropriate aids to its navigation, and that the title which the plaintiff acquired from the State was therefore subject in his hands, as it would have been in the hands of the State, to the exercise of this paramount power of the United States.

We admit that there is no kind of private property, whatever may be its nature or origin, that can be taken for public use without compensation; but in this case the United States have taken nothing from the plaintiff that ever belonged to him. They are only exercising a right which Maryland granted to them, long prior to her grant to the plaintiff, and to which therefore the plaintiff's title was subject from the beginning.

I.

The power to regulate commerce, which is granted to the United States by the Constitution, is something more than mere legislative authority to prescribe rules for the conduct of persons engaged in commerce, or to exercise the power of taxation and eminent domain for the improvement of navigation. It includes, as this court has repeatedly declared, "all of the powers which existed in the States before the adoption of the Constitution," and authorizes the Federal Government to lay hold of navigable rivers as the highways of commerce, and to deal with them, in the exercise of its sovereign power and control, through the direct agency of its own officers. The States, it is true, retain the legal title, but they hold it subject to the paramount right of the United States.

Judicial declarations and decisions as to the character and extent of the power granted to the Federal Government.

> All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed.

> The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their Government, and must have been contemplated in forming it. (Marshall, C. J., in *Gibbons* v. *Ogden*, 9 Wheat., 190.)
>
> The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. (*Ibid*, 189.)
>
> And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. (Mr. Justice Field, in *County of Mobile* v. *Kimball*, 102 U. S., 697.)
>
> Buoys and beacons are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by Congress is undoubtedly within its commercial power. (*Ibid.*, 698.)

South Carolina vs. *Georgia* (93 U. S., 4) was an original bill in equity filed in this court by the State of South Carolina to enjoin the Secretary of War from carrying on work in the Savannah River opposite the city of Savannah under certain acts of Congress making appropriations for that purpose. The Savannah River, where it flowed past the city of Savannah, was divided into two channels by Hutchinsons Island. Of these channels the more northerly was known as Back River, while that which passed immediately by the city of Savannah was called

Front River. The improvement consisted in the construction of a crib dam, at a point known as the "Cross Tides," for the purpose, by diverting a sufficient quantity of water passing through the Back River into the Front River channel, of securing to the city a depth of 15 feet at low water. The right of Congress was challenged on many grounds. In the course of the opinion Mr. Justice Strong said (p. 9):

> That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States—rivers that are accessible from other States, at least to the extent of improving their navigability—has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government, it has been so understood and determined. Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. In was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. *They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will.* This will not be denied; but the power to "regulate commerce," con-

> ferred by the Constitution upon Congress, is that which previously existed in the States. As was said in *Gilman* v. *Philadelphia* (3 Wall., 724), "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England." Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce.

It was argued by the counsel for South Carolina that Congress, though it might have the power to remove obstructions in navigable waters of the United States, had no right to place obstructions therein. Mr. Justice Strong answered this argument, first, by showing that the proposed dam was not an obstruction; and, secondly, by denying that the power of Congress was subject to the limitation suggested. He said (p. 11):

> It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to

> assist navigation or to change its direction by forcing it into one channel of a river rather than the other. *It may build light-houses in the bed of the stream.* It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted.

Wisconsin vs. *Duluth* (96 U. S., 379) was an original bill in chancery filed in this court by the State of Wisconsin against the city of Duluth, to enjoin certain work of harbor improvement that was being carried on, by dredging and otherwise, in Superior Bay under appropriations made by Congress. The bill was dismissed upon the ground that the authority of Congress was absolute. The United States did not have title to the submerged lands which were being operated upon, but that does not appear to have been regarded as an impediment to the authority of Congress. On the contrary, Mr. Justice Miller said (p. 383):

> It is to be observed, as preliminary to an examition of the acts of the General Government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the sea-coast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that Government, and that whenever it has taken charge of the matter, its right to an exclusive control has not been denied.

After reciting several of the acts of Congress under which appropriations had been made for that particular improvement, the learned justice said (p. 387):

> Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity, that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority. The adjudged cases in this court on this point are numerous. This subject was very fully considered in *South Carolina* v. *Georgia et al.* (93 U. S., 4), and at this term in *Pound* v. *Turck* (95 *id.*, 459). The doctrine was settled, however, long before this. The following cases are fully in point: *Gibbons* v. *Ogden*, 9 Wheat., 1; *Wilson et al.* v. *The Blackbird Creek Marsh Co.*, 2 Pet., 245; *The Wheeling Bridge Case*, 18 How., 421; *Gilman* v. *Philadelphia*, 3 Wall., 713. If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this court can have no lawful authority to forbid the work.

Boom Company v. *Patterson* (98 U. S., 403) was a case brought by the Boom Company for the condemnation, for

a log boom, of an island in the Mississippi River owned by Patterson. The company claimed that Patterson was only entitled to have the value of the island estimated as land, without considering its availability for a boom, because the company had, as it claimed, the exclusive privilege under its charter of constructing and maintaining booms at that point. Log booms are constructed, as is shown by the case, by building piers on the bottom of the river and connecting them by boom sticks so as to form a pen in which logs are floated and stored. This court rejected the claim of the company, declaring that if its charter from the state could be construed as granting it an exclusive privilege, that did not preclude the United States from granting the privilege. Mr. Justice Field said (p. 409):

> Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one.

2. *Judicial declarations and decisions as to the nature of the title retained by the States.*

> The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. (Chief-Justice Waite, in *McCready* vs. *Virginia*, 94 U. S., 391, 394.)

> But this soil is held by the State not only subject to, but, in some sense, in trust for, the enjoyment of certain public rights. (Mr. Justice Curtis, in *Smith* vs. *Maryland*, 18 How., 71, 74.)

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navi-

gable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. (Mr. Justice Swayne, in *Gilman* vs. *Philadelphia*, 3 Wall., 713, 724.)

It is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preëmption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. (Mr. Justice Field, in *Illinois Central Railroad* vs. *Illinois*, 146 U. S., 387, 452.)

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the State in their character as sovereign, in trust for public uses for which they are adapted. (*Ibid.*, 457.)

The title to lands under tide waters, within the realm of England, were, by the common law, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of

the use of navigable waters, the grant was void. In his treatise De Jure Maris (p. 22), Lord Hale says: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;" and Mr Justice Best, in *Blundell* v. *Catterall*, 5 B. and A., 268, in speaking of the subject, says: "The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil." * * * The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. (Andrews, J., in *People* v. *New York and Staten Island Ferry Company* 68 N. Y., 71, 76, quoted by Mr. Justice Field, in *Illinois Central Railroad* v. *Illinois*, 146 U. S., 457, 458.)

By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide waters ebbed and flowed, including flats, or the seashore, lying between high and low water mark, was in the king, as the representative of the sovereign power of the country. But it was held by a rule equally well settled that this right of property was held by the king in trust, for public uses, established by ancient

custom or regulated by law, the principal of which were for fishing and navigation. These uses were held to be public, not only for all the king's subjects, but for foreigners, being subjects of states at peace with England, and coming to the ports and havens of England, with their ships and vessels, for the purposes of trade and commerce. (Chief Justice Shaw in *Commonwealth* vs. *Alger*, 7 Cush., 53, 65.)

Rivers or streams within the ebb and flow of tide, to high-water mark, belong to the public, and in that sense are navigable waters; all the land below high-water mark being as much a part of the *jus publicum*, as the stream itself. (Cochran, J., in *Day* vs. *Day*, 22 Md., 537.)

It is very certain that by the common law the right was in the King of England; and it seems equally clear to me, that he had the capacity to dispose of it *sub modo*. Whatever doubts are entertained on the subject, they probably have arisen from inattention to the distinction between the power of granting an exclusive privilege, in violation or restraint of a common piscarial right, or other common right, as that of navigation, and the power of granting the soil *aqua coöperta*, subject to the common user. The subject has, *de communi jure*, an interest in a navigable stream, such as a right of fishing and of navigating, which can not be abridged or restrained by any charter or grant of the soil or fishery since *magna charta* at least. But the property in the soil may be transferred by grant—*Hargrave's Law Tracts*, 17, 22, 36, 37—subject, however, to the *jus publicum*, which can not be prejudiced by the *jus privatum* acquired under the grant. (Buchanan, J., in *Browne* vs. *Kennedy*, 5 H. & J., 203.)

Gann vs. *The Free Fishers of Whitstable* (11 H. L. Cas., 192) was an action brought by the owners of the bed of Whitstable Bay for an anchorage fee claimed under an immemorial usage. The ground of the judgment of the House of Lords, reversing the judgments of the common bench and of the exchequer chamber, is sufficiently disclosed in the following passages from the opinion of Lord Chancellor Westbury in the House of Lords, (pp. 208, 209):

> The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he can not in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. * * *
>
> Speaking with great respect to the learned judges in the court below, it appears to me that the error of the judgments consists in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part, that no property can be claimed in the soil except subject to this overriding right.

But the right to build light-houses in the public waters, being necessary for their safe navigation, must be regarded as an essential part of the right of navigation, as much so as the right to cast anchor or to build wharves; and since no property can be claimed in the soil, not even by the crown, except subject to this overriding right, it would seem clear that the title which the States have retained is held by them subject to the right of the United States to enter, whenever Congress sees fit, for the erection of light-houses and other aids to navigation.

Stockton, Attorney-General, vs. *Balto. & N. Y. R. Co.* (32 Fed. 9) was an information filed by the attorney-general of New Jersey to enjoin the defendant railroad company from erecting a bridge across "Arthur Kill," between New Jersey and Staten Island, upon lands of the State situated on the shore and under the waters of the "Kill." The railroad company claimed the right to build the bridge and to occupy the lands under water necessary for the support of its piers by virtue of an act of Congress approved June 16, 1886, entitled "An act to authorize the construction of a bridge across the Staten Island Sound, known as 'Arthur Kill,' and to establish the same as a post-road." The constitutionality of the act, and the right of the railroad company to construct a bridge, were denied upon many grounds, all of which were overruled by Mr. Justice Bradley. In the course of his opinion, he said:

> The most strenuous objection, however, to the exercise of the power in this case, and in the manner proposed, is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, on land

which belongs to the State, and that no compensation is proposed to be made for the taking thereof. It is contended that, if the land of the State can be taken at all (which is denied), it can, at most, only be taken, like other private property, after just compensation has been made.

First, it is denied that the land of the State can be taken at all without voluntary cession, or consent of the State legislature. If this is so, we are brought back to the dilemma of requiring the consent of the State in almost every case of an interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a State will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position can not be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in Congress. It overlooks the fundamental principle that the Constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a State is necessary, such State may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the Constitution (pp. 17, 18).

But, secondly, it is contended that if the United States can constitutionally take the land of the State, as well as that of the citizen, for public purposes, without consent, it can only do so in the same manner, and subject to the same conditions, namely, that of making just compensation. It is urged that the language of the fifth amendment of the Constitution is applicable to the case, and is imperative. This language is, "Nor shall private property be taken for public use without just compensation." It is insisted that the property of the State in lands under its

navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, Can the United States take the statehouse at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the General Government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the statehouse is quite different from that by which it holds the land under the navigable waters in and around its territory.

The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the King, *in trust* for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large.

* * * * *

Such being the character of the State's ownership of the land under water,—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce,—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the

meaning of the constitution. The fifth amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original public use. It is not so considered when sea walls, piers, wing-dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care.

The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at

its pleasure. And all this power is derived from the power "to regulate commerce." Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient.

Entertaining these views with regard to the power of Congress over the whole subject of the regulation of commerce among the several States, including that of the navigable waters of the country and the lands under the same as subsidiary to that end, we have no hesitation in declaring our opinion to be that the authority given by the act of June 16, 1886, to build the bridge in question and for that purpose to erect the necessary piers of such bridge upon the lands under water of Arthur Kill, is valid and constitutional, and does not injuriously affect any property or other rights of the State of New Jersey (pp. 19, 20, 21).

This ruling of Mr. Justice Bradley goes farther than is necessary to support the contention of the Government in the case at bar, for it holds that the bed of a river may be used by the United States without compensation and without the consent of the State, not merely in aid of the navigation of the river itself, but for the construction of a bridge over the river in aid of interstate commerce generally.

The claim that Congress can not use the beds of navigable waters for the attachment of light-houses without

making compensation, is equivalent to saying that Congress can not establish light-houses in those waters without the consent of the States, for the title to the soil under the waters is, and at the adoption of the Constitution was, for the most part, in the States, and against them there is no power of condemnation.

Such a claim, moreover, overlooks the fact that Congress acts as sovereign in the exercise of a paramount right over the waters themselves, and not by virtue of the power of eminent domain; and it ignores not only the circumstances attending the formation of the Constitution, but the practical construction which has been given to it for more than a century. The power to regulate commerce was granted to the United States for the common good of all the people, and it is inconsistent with the grant to suppose that the States meant to reserve claims for money compensation with respect to the waters, held by them *publici juris*, which Congress might find it necessary to use in the execution of the grant. The waters of the Union are dotted with light-houses and buoys built by the United States, and it is believed that compensation has not been made in any instance either to the States or to private owners. The case of Hill (149 U. S., 593) seems to be the first of the kind.

II.

The plaintiff's counsel substantially concedes, however, that the United States might occupy this site without compensation, if the title remained in the State. But he claims that it is competent for a State to sell and convey,

free from the trusts of navigation, those portions of its rivers which are not needed for navigation, and that a patent granted by the State must be presumed, in the absence of evidence to the contrary, to include only portions which may be thus granted. He says (Brief, p. 8):

> Where submerged land is still held by a State, subject to the trusts of navigation and fishery, the General Government, perhaps under the commercial power, has the right to erect a light-house on the submerged land as an aid to navigation, without condemnation and compensation. But when a State has granted to a citizen a parcel of submerged land that may afford foundation for wharves, piers, docks, and other structures, or a parcel of submerged land which being occupied, does not substantially impair the public interest in the lands and waters remaining, the title thereto is vested in its grantee free from all public trusts or easements, and consequently there is no longer any easement to support the erection of a light-house on the land by the Light-House Board as a mere aid to the enjoyment of an existing servitude.

And again, on page 6 of his brief, he says:

> The submerged land when freed by the State from all public trusts is in exactly the same predicament as the fast land on the adjoining shore, where, undeniably, the Light-House Board could not erect a light-house without condemnation and paying for its site.

But a State has no authority to free lands from trusts which reside in the United States, nor by her own act to affect or defeat the interest of the United States; it is not competent for a trustee to destroy the title of his *cestui que trust*.

And how can the court say that the part of the bed granted to the plaintiff is not needed for the uses of navigation, especially in the face of the action of Congress appropriating it to those uses? There is no power in the courts to determine, as between a State and the United States, what portion of a river shall or shall not be taken or improved by Congress. In such matters Congress is not subject to judicial control. That was decided in *Wisconsin vs. Duluth* (96 U. S., 379). And in the *Wheeling Bridge Cases* (13 How., 518, and 18 How., 421), Congressional assent to a substantial obstruction of a navigable river was recognized as sufficient to prevent the execution of a decree of this court requiring the abatement of what, but for that assent, would have been in the judgment of the court a public nuisance. In the case of *Bridge Company* vs. *United States* (105 U. S., 470), the Bridge Company proposed to prove that its bridge, which Congress had ordered to be altered or removed, was not in fact an obstruction to navigation, but the court held itself bound by the decision of Congress, and recognized that decision as making the bridge an obstruction in law, even if it was not an obstruction in fact.

Willson vs. *Black Bird Creek Marsh Company* (2 Pet., 245) and *Pound* vs. *Turck* (95 U. S., 459) illustrate the power of the States in the absence of Congressional legislation, and therefore the power of Congress, if it chooses to exercise it, to build dams all the way across navigable streams. The cases are inconsistent with the theory that the authority of the United States is confined to the channel or to any other part of the bed of a river.

The fact that the Government had not seen fit to build a light-house at Hawkins Point prior to 1861, did not affect its right to do so thereafter, nor authorize the State to convey that site except subject to the continuing control of Congress thereover.

If the plaintiff, relying upon the inaction of Congress, had built structures upon the portion of the bed granted to him by the State there might be a question of the power of the United States to destroy those structures without making compensation. But that question does not arise in this case.

In *Commonwealth* vs. *Alger* (7 Cush., 53), where the subject is considered in an elaborate opinion by Chief Justice Shaw, it was held that an act of the legislature fixing a line within the harbor of Boston beyond which no riparian proprietor should erect a wharf or other permanent structure, was a valid exercise of legislative power as against flats owned in fee by private persons who had not built structures thereon prior to the passage of the act, although the legislative power to affect proprietors who had already built wharves seems to have been doubted by the judges, if it was not expressly denied. And in *Boston* vs. *Richardson* (105 Mass., 351, 362), Mr. Justice Gray said:

> Even a title in flats by grant from the colony or commonwealth is subject, *so long as they have not been built upon*, to the authority of the legislature, for the protection of the harbors and the public right of navigation, to prohibit the taking of sand and gravel from the shore, or the erection of wharves beyond certain lines.

Nothing said in either case, however, relates to the paramount power of Congress. Upon that subject, Mr. Justice Bradley in *Willamette Iron Bridge Company*, v. *Hatch* (125 U. S., 12, 13) said:

> And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others being made, except in conformity with such regulations as it may impose.

In *Bridge Company* vs. *United States* (105 U. S., 470) a bridge was built across the Ohio River at Cincinnati in accordance with the terms of a charter conferred by State laws and a joint resolution of Congress. While the bridge was erecting, in compliance with these provisions of law, Congress by statute declared that it should be unlawful to proceed therewith unless certain changes were made. The company made them, completed the bridge in accordance with the altered plans, and brought its suit against the United States under a special act of Congress which authorized the company to recover the cost of making the alterations, if the court should find the United States liable therefor. This court held that the United States were not liable. The decision was placed upon the ground that the original resolution of Congress, under which the bridge was authorized, contained a reservation of the right to withdraw the assent of Congress in case the free navigation of the river should at any time be substantially and materially obstructed by the bridge; but, inasmuch

as it was proved that the bridge would not have been a material or substantial obstruction to navigation if completed under the original plans, the case must be taken as in effect affirming the plenary power of Congress to remove structures in navigable rivers without making compensation, whether they are in fact impediments to navigation or not, and although they may have been erected with the express consent of Congress.

Such is the effect attributed to the decision by the dissenting justices. Mr. Justice Bradley, dissenting, said (pp. 506, 507):

> The bridge was a lawful structure, and in the lawful possession of the appellants as their private property; and being such, I think that Congress could not constitutionally require its demolition or reconstruction, without providing for compensation.

Mr. Justice Field, also dissenting, said (p. 500):

> Yet the court below held, and this court sustains its ruling, that for the enormous expenditures forced upon the company the United States are in no way responsible. This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute; and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.

Chief Justice Waite, delivering the opinion of the court, said (p. 479):

> The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful

structure, no legislation of a State can make it lawful. Those who act on State authority alone necessarily assume all the risks of legitimate Congressional interference.

It is true that in *Illinois Central Railroad Company* vs. *Illinois* (146 U. S., 387) the right of the State to grant parcels of submerged lands for the erection of wharves, docks, and piers was recognized, but no question of the grantee's right to hold such lands free from the future control of the United States was raised or decided. The United States were not even parties to the suit. See Statement, p. 390, and Opinion, p. 433.

Yates vs. *Milwaukee* (10 Wall., 497), relied on by the plaintiff, related to the right of a riparian owner to maintain a wharf already constructed, which was not a nuisance in fact, as against the order of a mere municipal council to abate that particular wharf, and *Dutton* vs. *Strong* (1 Black, 23) involved the remarkable claim made by the owner of a vessel who was a mere trespasser, that he had the right to destroy a wharf which had been erected and was being maintained by a riparian owner with the consent of the State.

Neither case presents the question of the power of the Federal Government or of a State to abate a wharf, much less the power of the Federal Government to occupy, in aid of navigation, submerged land upon which no structure has been erected.

III.

Plaintiff's counsel insists finally that his riparian rights have been infringed. But if the plaintiff's title in fee to

the very soil to which the light-house is attached gives him no right to compensation against the United States, surely his ownership of adjoining land gives him no such right. In other words his claim as riparian owner can not be better than his claim as owner of the fee of the very soil which has been taken.

But this is not a suit to recover a riparian easement, nor an action for damages for obstructing such an easement, nor is it a proceeding to abate a nuisance. The declaration does not contain allegations appropriate to a suit for either of those purposes; it does not even allege that the plaintiff is the owner of the fast land opposite the light-house. It makes no allusion to a riparian title. The action is to recover possession of the submerged soil by virtue of a title claimed in fee under a grant from the State of Maryland, and no question of the plaintiff's riparian rights arises.

But if it be insisted that the plaintiff's riparian rights are involved, and that the pleadings are sufficient to present them, I submit

1. That ejectment is not the proper remedy on the part of a riparian owner to secure the removal of an offending structure from the waters in front of his upland (*Coburn* v. *Ames*, 52 Cal., 385, 398 (1877); *Parker* v. *West Coast Packing Co.*, 17 Oreg., 510 (1889); *Pierce* v. *Kennedy*, 2 Wash., 324 (1891); *Austin* v. *Rutland Railroad Co.*, 45 Vt., 215, 244, distinguishing *Nichols* v. *Lewis* (15 Conn., 137), which was for the recovery of flats that had been reclaimed and filled up so as to become a part of the fast land.

2. That it is no infringement of the plaintiff's riparian rights for the Government to build in front of his upland a light-house such as is established at Hawkins' Point. Even assuming that a riparian owner has an absolute right, under the law of Maryland, of access to the channel and to wharf out for that purpose, it is not shown that the plaintiff's access is obstructed by this light-house.

In several cases in this court, involving contests between private persons, it has been said, interpreting local laws, that riparian owners have the right of access to the water in front of their land and the right to build wharves and piers for that purpose. (*Yates* v. *Milwaukee*, 10 Wall., 497; *Railroad* v. *Schurmeier*, 7 Wall., 272; *Dutton* v. *Strong*, 1 Black, 23; *St. Louis* v. *Rutz*, 138 U. S., 226, 246.) But it has never been decided that riparian owners have any rights except such as are subject to the absolute control of the State. On the contrary, in *Hoboken* v. *Pennsylvania R. R. Co.* (124 U. S., 656), this court approved the decisions of the court of errors and appeals of New Jersey under which it was held competent for the State, by grant to a third person, to cut off completely the riparian owner's access to the water.

It has been held in many cases that a riparian owner's right of access can not be destroyed without compensation by private persons or corporations. (*Rumsey* v. *N. Y. & N. E. R. R. Co.*, 133 N. Y., 79; *Delaplaine* v. *C. & N. W. Ry. Co.*, 42 Wis., 214; *Carli* v. *Stillwater St. R. & T. Co.*, 28 Minn., 373; *Brisbine* v. *St. Paul & S. C. R. R. Co.*, 23 Minn., 114; *Ashby* v. *Eastern R. R. Co.*, 5 Met., 368; *Organ* v. *Railroad Co.*, 51 Ark., 235; *Lincoln* v. *Davis*, 53 Mich., 375; *Bainbridge* v. *Sherlock*, 29 Ind.,

364.) And it has been suggested that the State may be limited in its power to destroy *wharves already constructed*. But in no case has the right of the State been denied, as against riparian owners, to build structures in aid of navigation, such as wharves, piers, light-houses, etc., upon unoccupied portions of the shore.

In *Eisenbach* v. *Hatfield* (2 Wash., 236), where most of the American authorities are reviewed, it was held that an act of the territorial legislature granting riparian owners the right to establish wharves in front of their land was in the nature of a license revocable at any time before structures had been erected thereon. To the same effect is *Bowlby* v. *Shively* (22 Oreg., 410).

The authority of a riparian owner to project wharves or piers into navigable waters or otherwise to occupy the shore, is only as an aid to navigation (*Atlee* v. *Packet Co.*, 21 Wall., 389), and it would seem that the right of the State to erect light-houses, also as aids to navigation, is at least of equal degree.

While this brief is passing through the press the decision in *Shively* v. *Bowlby* (152 U. S., 1) is announced, where the whole subject of riparian rights and the title to submerged lands is considered in a learned and luminous opinion, and the decision of the circuit court of appeals for the sixth circuit upon almost the identical question is brought to my notice. (*Scranton* v. *Wheeler*, 57 Fed. Rep., 803.)

I respectfully submit that the judgment of the circuit court should be affirmed.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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IN THE

Supreme Court of the United States.

TERM NO. ~~92~~ 16 OCTOBER TERM, 1893.

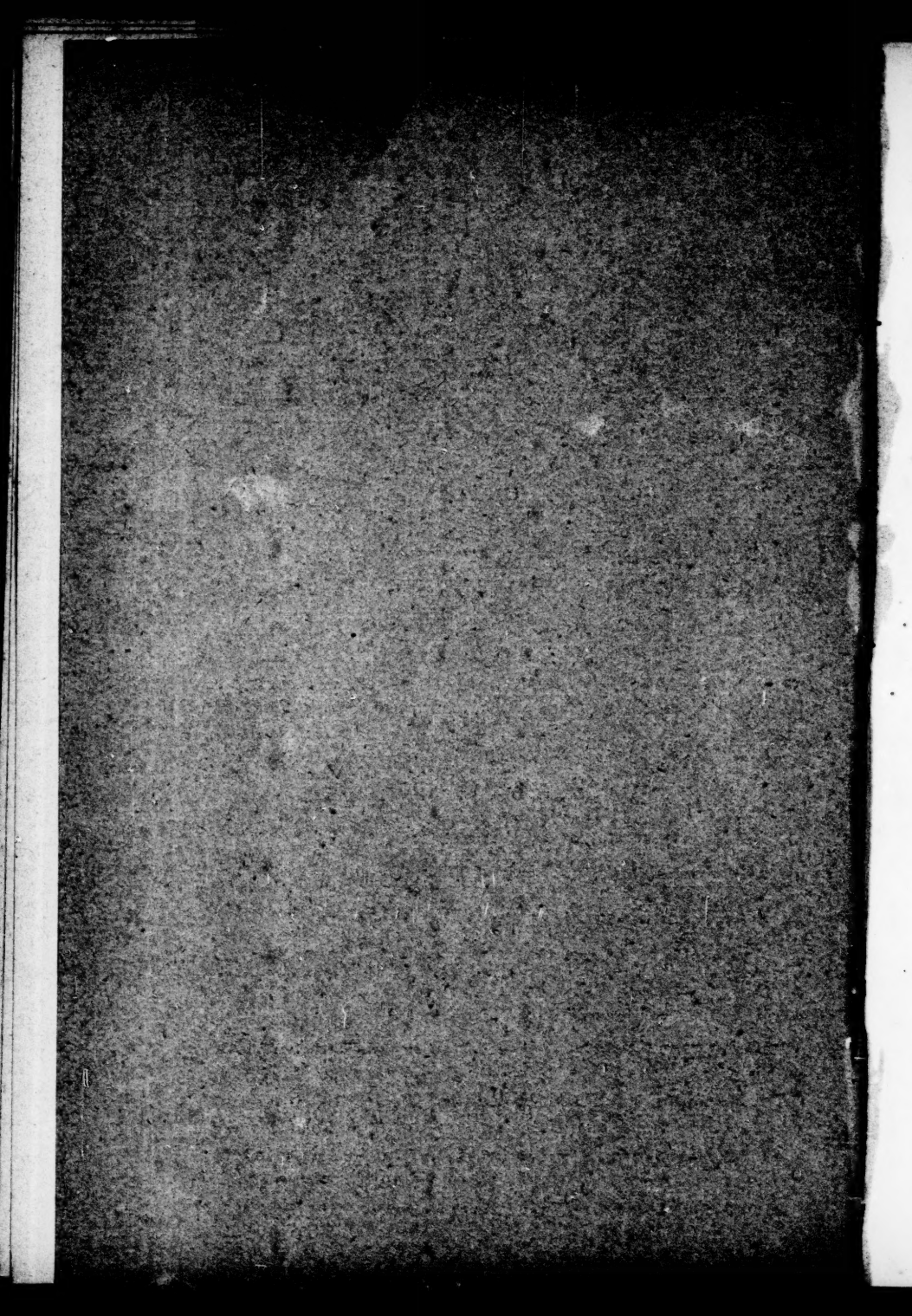
THOMAS C. CHAPPELL, *Plaintiff in Error.*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

THOMAS C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.



IN THE

Supreme Court of the United States.

TERM No. 82. OCTOBER TERM, 1893.

THOMAS C. CHAPPELL, *Plaintiff in Error.*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

The private title in a grant for submerged land has been settled by this Court. "If the State in the regulation of its public domain can grant to its own citizens *the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water.*" McCready vs. Virginia, 94 U. S., 394.

All patents for submerged land granted by the State of Maryland prior to the Act of 1862, wherein the grant of such patents were thereafter prohibited, confer on the grantee exactly the same title as was conferred by the State of New Jersey to the Pennsylvania R. R. Co. for the submerged land in front of the city of Hoboken. "*Lands below high water mark in navigable waters are the absolute property of the State, subject only to the power conferred in Congress to regulate foreign commerce and commerce between the States, and they may*

be granted by the State either to the riparian proprietor or to a stranger, as the State may see fit." 124 U. S., on pages 656-657. Mr. Justice Matthews.

It cannot be contended that the plaintiff in error has not a private title in the submerged grant. He has filled in and reclaimed a large portion of it, and has only been prevented from filling in that portion occupied by the Hawkin's Point Light House by the decision of the lower Court in this case by which he is prevented from exercising his private rights. Stevens vs. Paterson and Newark Railroad, 5 Vroom (34 N. J. Law); Langdon vs. New York City, 93rd N. Y. 129, 155; cited with other authorities in the dissenting opinion of Mr. Justice Shiras in which Mr. Justice Gray and Mr. Justice Brown concurred, 146 U. S., 465.

The plaintiff in error being the riparian proprietor as well as the grantee of the submerged grant, possesses all the incidents of both estates.

The Courts of the State of Maryland have affirmed the same doctrine. "It has been determined that land covered by navigable water may be granted by the State to an individual (Browne vs. Kennedy, 5 H. & J., 195), whence it seems to follow that if land covered by navigable water of a public port was held as *private* property by an individual, he might have a right to demand and receive reasonable toll for anchorage in the port, in respect to his property in the soil and as an evidence of it, Hale de Portibus 74, 1661 Ch. 7, S. 1, 1682 Ch., 4." 3 Bland, page 373. Judgment affirmed by Court of Appeals, 5 Gill & Johnson, page 357; from which it appears that the State Courts of Maryland have interpreted the case of Browne vs. Kennedy, 5 H. & J., 195, diametrically contrary to the construction placed upon it by the lower courts in this case. See also Goodsell vs. Lawson, 42 Md., 364.

"The grant of 'Bold Venture,' *though for the most part covered wih water, still passes to the grantee all the soil underneath the water, included within its outlines, with all the rights of property incident thereto,* subject only to the rights of the public, as to fishing and navigation. If it had been encroached by any person, *as by driving of piles and erecting a wharf, or building a house thereon, an action of trespass or ejectment could have been maintained by the patentee, or those claiming under him.* See the case of Browne vs. Kennedy, 5 H. & J., 210." Casey vs. Inloes et al., 1 Gill, 512 (side paging). The doctrine laid down in Casey vs. Inloes, is affirmed by the Court of Appeals of Maryland in Goodsell vs. Lawson, 42 Md., 364, and Coan vs. Linthicum, 64 Md., 439.

These cases settle beyond question the private nature of the title of the plaintiff in error in the submerged grant and his right to maintain a suit in ejectment for the driving of the piles upon which the Light House stands.

The power to regulate navigation does not carry with it a right to the soil under navigable waters which will warrant its permanent and exclusive occupancy by the general government without regard to or in derogation of the rights and ownership of the premises. In Adams vs. Emerson, 6 Pick., 57, it was held that the owner of the soil over which a turnpike road was laid out might maintain trespass against the turnpike corporation for taking the herbage. In deciding this case, the Massachusetts Court says: "The locus in quo, although a part of a turnpike road, is the soil and freehold of the plaintiff."

"A right to send rays from a Light House across a private close, unobstructed by future erections thereon by the owner, is an easement which must be gained by the United States in the usual way: *i. e.*, by grant,

express or implied, from the owner of the close. In the absence of such a grant by the owner, this right to build upon the close remains intact; and, if he is unwilling to make a grant, the United States are left to have recourse, under the law of eminent domain, to condemnation of the property for the public purpose involved." 16th Op. Att'y Gen., 631.

The recent cases in which Mr. Justice Brewer delivered the opinion of the Court entirely overrule the theory adopted by the United States District Attorney in his brief, and the lower court in its opinion, of the cases therein cited, in this case.

In the case of St. Louis vs. The Western Union Telegraph Co., 148 U. S. 92, the Court says: "No one would suppose that a franchise from the Federal Government to a corporation, State or National, to construct inter-State roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual and appropriate it without compensation, and the principle is the same when under the grant of a franchise from the National Government a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed for an instant that under a franchise from Congress to construct and operate an inter-State railroad the grantee thereof could enter upon the State grounds of a State and construct its depot there. Although the State House grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, *and it is not within the competency of the National Government to dispossess the State of such control and uses and appropriate the same to its own benefit* or the benefit of any of its corporations or grantees without suitable compensation to the State. This

rule extends to streets and highways; they are the public property of the State," and also, "No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation." This rule reverses the doctrine laid down in the case of Stockton vs. the Balto. & N. Y. R. R. Co., 32 Fed Rep., 19. At any rate the doctrine never was applicable to the private property of an individual.

"The State owns the bed of all tide water within its bounds, unless they have been granted away." McCready vs. Virginia, 94 U. S., 394. The Federal Government or its grantees or corporations has no greater right to appropriate property in submerged lands than in dry lands.

"*And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway.*" Monongahela Navigation Co. vs. U. S., 148 U. S., 312, page 336.

The case of South Carolina vs. Georgia, 93 U. S., cited in the opinion of the Court below has no applicability to this case. The rule laid down in that case was, that the powers conferred on the United States by the Constitution could not be limited by an impact between the States of South Carolina and Georgia made before the adoption of the Constitution. There was no question of the right of the United States to appropriate for its own use either the private property of an individual or the public property of the State, and if the case could be possibly interpreted to support any such doctrine the recent case of St. Louis vs. the Western Union Telegraph Co. and the Monongahela Nav. Co. vs. U. S., overrule it Art. I, Sec. 8, Clause 17, Cons. U. S., prohibits the Federal Government from erecting

a public building within a State without the consent of the State. See also Sec. 355, R. S. U. S. The case of Gilman vs. Philadelphia, 3 Wall., 713, has no applicability to the case at bar whatsoever. The doctrine followed in that case was the same as that in the rule laid down in the cases relating to opening streets and highways and changing the grades thereof, viz., that where no property of the party is taken the damage is too remote to support an action. Otherwise, there is nothing in the case of Gilman vs. Philadelphia which barred the plaintiff from bringing on action at law for damages.

A franchise granted by a State is valid and not repugnant to the Constitution of the United States, and private rights accruing under said grants cannot be impaired or destroyed or appropriated by the United States Government without compensation. The rule was originally laid down by Chief Justice Marshall in the Blackbird Creek case, and has been followed by this Court in all its subsequent decisions, the most recent being the Mong. Nav. Co. vs. U S. supra, in which all the previous cases are cited. "The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among foreign nations and among the several States, a power which has not been exercised as to affect the question. We do not think the act empowering the Blackbird Creek Marsh Co. to place a dam across the creek can, under the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." 2nd Peters 245.

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have

heretofore quoted. Congress has supreme control over regulation of thecommerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed, subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefore. And if that property be improved under authority of a charter granted by the State with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made, and that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway." Monongahela Nav. Co. vs. U. S. 312, page 336. Mr. Justice Brewer.

"The exclusive right of making improvements into the waters in front of his land," conferred upon the proprietor of land bordering on any navigable waters of the State by the Act of 1862, is a franchise which if impaired, diminished or destroyed or appropriated by the Federal Government, must be paid for whether the improvements have been constructed or not. Casey's Lessee vs. Inloes, 1 Gill. Goodsell vs. Lawson, 42 Md. Balto. & Ohio R. R. vs. Chase, 43 Md., supra.

This franchise is the chief incident of riparian property which gives it value and if destroyed destroys the value of the property.

It has been held that where a patent for a submerged grant was issued prior to the Act of 1862 to a stranger, the rights of the riparian proprietor were intercepted if the right had not been exercised at the date the patent issued. In the present case there can be no such question as the patent for the submerged grant was made to the riparian proprietor and not to a stranger. The lower Court confused this doctrine. *The exclusive right to make improvements*, is the franchise, the quasi—property, and it was *a vested right when* the United States siezed the site of Hawkin's Point Light in 1868 and appropriated it, together with the strip of land over which the rays of the range lights are thrown, and which must be kept clear of buildings to permit an unobstructed view of said lights to the dredged channel. Said siezure and appropriation was made without due process of law and without compensation to any one and was unlawfui and repugnant to the Fifth Amendment of the Constitution of the United States.

"The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. obviously this question as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government is of importance. For in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government." Monongahela Nav. Co. vs. U. S., supra, see page 324, also 329-330.

The Lake Front case expressly recognizes the right of the riparian proprietor to make improvements in front of his land to the point of navigability, in fact the whole tenor of that decision is to the effect that the City of Chicago being the riparian proprietor of the Lake front with the exception of the several lots owned in fee by the Illinois Central R. R. Co., that from the nature and circumstances of the case the granting act of the Legislature was improper, because its effect would be to intercept the riparian rights of the said city, whose shipping exceeds that of New York and Boston combined, and grant a monopoly of the wharfage thereof to the Illinois Central Railroad, and that therefore the repealing or rescinding act annulling the granting act was not an act repugnant to the 14th Amendment to the Constitution of the United States.

The recent case decided by the Supreme Court of Connecticut and cases therein cited shows that the riparian proprietor has the right to extend his wharves to the deep water of the channel. Prior vs. Swartz, 25 Atlantic Rep., 398.

The act of any other improver (except where he holds a valid submerged grant from the State for such a portion as it is competent for a State to grant) is a mere trespass, and the improvements become the property of the owner of the adjacent land. Casey's Lessee vs. Inloes et al., 1 Gill, page 500. Goodsell vs. Lawson, 42 Md., pages 365-366.

It is respectfully submitted in conclusion that the opinion of Attorney General Garland (Record, page 29-31) is in direct accord with the recent decisions of this Court cited supra, and that if the United States desires to acquire the site of Hawkin's Point Light and the strip for the range lights the instructions contained in the letter of the Secretary of the Treasury, dated Nov. 17th, 1887, to John C. Mallery, agent for the United States (Record, pages 10-11) directing the condemnation of the site of Hawkin's Point Light, and also an

easement over a strip of both the submerged and dry land from Thomas's Cove across Point Lookout and into the deep and navigable waters of the Patapsco River, must be carried out, and a just compensation paid to the owner therefor.

The opinion of the learned Attorney General and the instructions of the Secretary of the Treasury, ex officio President of the Light House Board, in accordance therewith, ought to have been sufficient authority for the learned U. S. District Attorney, and Captain Mallery, an officer of the Light House Board, to have proceeded accordingly, but on the contrary, the petition filed by said Mallery by the advice of the said U. S. District Attorney, while admitting the title of the plaintiff in error in the submerged land (Record, page 23) set up a claim to permanently occupy the same in derogation of his rights of ownership, and to take the same for public use without due process of law and without just compensation.

This action compelled the plaintiff in error to institute this suit to prevent the Federal Government from obtaining a title by adverse possession, and to maintain his rights under the Fifth Amendment to the Constitution of the United States. The proceeding instituted by said Mallery in the Circuit Court for Anne Arundel County was subsequently abandoned, but no other proceeding has been instituted for the condemnation of the site for Hawkin's Point Light or an easement over any of the submerged land of the plaintiff in error, but the United States Government has continued to permanently occupy and use the same without any compensation to the plaintiff in error. It is submitted that the theory of estoppel set up in the answer of the plaintiff in error to the petition for removal (Record, page 11) applies as well to a State as to an individual

"The contract between Georgia and the purchasers was executed by the grant . . . . . A party is

therefore always estopped by his grant..... Is the clause to be considered as inhibiting the State from impairing the obligation of contract between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every description." Fletcher vs. Peck, 6 Cranch Reports 87, Marshall, C. J.

The Federal Government is subject to the same rules and is bound by the same admissions of its counsel, and the conduct of its duly authorized officers, as is an individual, in regard to its contracts, expressed or implied, necessary to the execution of a public duty.

"The Government is, therefore, capable of making contracts and its contracts may be made in the name of the United States..... The proposition then is true, *that there is a contract in every case where it is necessary to the execution of a public duty.*" U. S. vs. Maurice et al., 2 Brockenbrough's Reports, 96. Marshall, C. J.

"Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is shown, *and the same rule applies to a Government* which is capable of making a contract." Ibid.

The opinion of the learned Attorney General was an act under the law arising in Section 356, Revised Statutes, U. S., and was furnished to the plaintiff in error by direction of the Secretary of the Treasury (Record, page 11); it ought to have been conclusive on the Government. "But if an act be done under the law a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power." Fletcher vs. Peck, supra.

The case of the Monongahela Nav. Co. vs. U. S, cited supra, fully sustains the opinion of the learned Attorney

General, and unequivocally lays down the rule that in improving a natural way the Federal Government must make just compensation for any part thereof appropriated and for any franchise therein taken.

"Whenever, in the progress of a case, a demurrer is interposed to any pleading, it is the duty of the Court, in passing upon it, to inspect the whole record, and mounting up to the first fault, to give judgment against the party committing the first material error, *if the error be such as would make the pleading bad on general demurrer*; or in other words, if the fault be one bad in substance" Poe P. & P. Vol. 1, Sec. 706.

The Act of the General Assembly of Maryland, Chap. 74, approved March 14th, 1888, Code of Public General Laws of Md., Vol. 1, page iii, provides that the Code shall constitute the law, in lieu of or as a substitute for the Public General and Public Local Laws of the State in force on the 1st of January, 1888.

Art. 75, Sec. 69, page 1128, of the said Code entitles the plaintiff in error to a judgment for all of the land described in the declaration, as to which the defendant in error disclaimed and refused to defend, Sec. 721, R. S. U. S., makes this law of the State a rule of decision in the Courts of the United States, it is respectfully submitted the plaintiff in error is entitled to said judgment. It is also respectfully submitted, that under the decisions of the State Court in Casey's Lessee vs. Inloes, 5th Gill, 512, Goodsell vs. Lawson, 42 Md., pages 365-366, and in this Court in the case of Hoboken vs. The Penn. R. R. Co., 124 U. S., supra, in which the *jus publicum* is definitely held to be subordinate to the *jus privatum* in a submerged grant, in which Mr. Justice Matthews delivered the opinion of the Court, and in the recent case of the Ill. Cent. R. R. Co. vs. Ill., in which Mr. Justice Harlan delivered the opinion of the Court, and in St. Louis vs. The Western Union Telegraph Co., and the Monongahela Nav. Co. vs. U. S., in which Mr. Justice Brewer delivered the opinion of the Court, the plaintiff in error is entitled to a reversal of the judgment of the lower court, with costs, wherefore it is prayed that said judgment be reversed, and the cause remanded.

THOMAS C. CHAPPELL.

Plaintiff in Error and Solicitor in Person.

IN THE

Supreme Court of the United States.

TERM No. 16. OCTOBER TERM, 1894.

THOMAS C. CHAPPELL, *Plaintiff in Error*,

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

Brief for the Plaintiff in Error on Questions involved in Motion to Remand.

THOMAS C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.

IN THE

Supreme Court of the United States.

TERM No. 16. OCTOBER TERM, 1894

THOMAS C. CHAPPELL, *Plaintiff in Error,*

vs.

JAMES M. WATERWORTH, *Defendant in Error.*

BRIEF FOR THE PLAINTIFF IN ERROR ON QUESTIONS INVOLVED IN MOTION TO REMAND.

(*a.*) WHETHER THIS CAUSE ARISES IN THE CONSTITUTION OF THE UNITED. States

(*b.*) WHETHER THE FEDERAL JURISDICTION EXTENDS TO A JUDGMENT FOR THE LAND IN THIS CAUSE.

STATEMENT OF THE CASE.

The importance of the question and the immense interests involved, render it necessary to set forth a detailed statement of the case.

STATEMENT.

On the second day of July, 1861, the State of Maryland issued to John M. Johnson, a patent, describing by metes, bounds, courses and distances, one hundred and thirty-three acres, one rood and three and one quarter

perches of land, *together with all rights, profits, benefits and privileges thereunto belonging.* The said land is known as the Addition to Johnson's Harbor, and adjoined the adjacent fast land of said Johnson, who was the predecessor in title of the plaintiff to all of said land.

In the year 1868, the officers of the Light House Board of the United States, without an express act or authority of Congress, and with no other color of authority than a mere act appropriating money for the purpose of constructing beacons to light the Brewerton Channel, seized a portion of the land described in the patent aforesaid, and built the Hawkins' Point Light House upon it—and a controversy arose as to the right of the officers of the Light House Department to seize said land—and subsequently, the State of Maryland, in the year 1874, passed an act authorizing the Governor of the State to convey land covered by navigable water, to the United States, provided no single tract contained more than five acres.

Subsequently, on the 20th of February, 1877, the Governor of the State of Maryland executed a deed to the United States for the five acres of land described by the circle set forth in the declaration in this cause.

Subsequently, the Secretary of the Treasury, as President ex-officio of the Light House Board, referred the question of the validity of the title of the United States, under said deed, to Attorney General A. H. Garland. Subsequently, the Attorney General, A. H. Garland, referred the search of title to Archibald Stirling, the United States District Attorney for Maryland. Subsequently, the said United States District Attorney advised the Attorney General that the State had made a prior grant for the same land, the title to which was in the plaintiff in error. Subsequently, the Attorney General wrote an opinion and advised the Secretary of the Treasury, ex officio President of the Light House Board, that no title whatever passed by the deed from the Governor of the State of Maryland to the United

States, and the title to the site of Hawkins' Point Light House is in the plaintiff in error. Subsequently, the Secretary of the Treasury directed the Superintendent of Light Houses for Maryland, to condemn a circle describing two acres of land, the centre of which is Hawkins' Point Light House, and an easement over a strip of the land of the plaintiff in error, sixty feet wide and five thousand six hundred and fifty feet long, more or less, to the deep and navigable waters of the Patapsco river. And thereupon, the said Superintendent of Light Houses for Maryland, John C. Mallery, filed in the Circuit Court for Anne Arundel County, on the equity side of said Court, a petition for the condemnation of the circle describing the said two acres, and the easement over the strip aforesaid; but while admitting the legal title of the plaintiff in error to all of said land, set up a claim that the United States could condemn the circle describing said two acres, and an easement over the strip sixty feet wide and over a mile in length, without making any compensation to the plaintiff in error, the owner of the fee, for the land which is submerged. Subsequently, the said John C. Mallery dismissed said petition.

The plaintiff in error, who was the plaintiff below, in order to preserve all of his rights and to prevent a title by adverse possession, instituted this action in ejectment against the defendant in error, in the Circuit Court for Anne Arundel County, and described as the *locus in quo*, the five acres described in the deed from the Governor of the State, which the Attorney General had admitted to be invalid, and a strip extending beyond said five acres, to the deep and navigable waters of the Patapsco river towards the Brewerton Channel, occupied for the transmission of rays of light from the Hawkins' Point and Leading Point lights, both lights being transmitted over this strip—the rear light being above the front one.

The defendant in error, who was the defendant below, filed in the State Court a petition for removal, in which he alleged all of the *locus in quo* was submerged land, and

set up an outstanding title in a stranger, (that is to say in the United States,) by way of defence, as follows:

> "The title to the *locus in quo*, described in the declaration in this suit with the right of possession, is averred by this defendant, to be now and to have been at the commencement of said suit, in the United States of America. * * * And in defense of the title of the United States to the same, he relies upon Article 1, section 8, of the said Constitution of the United States, which is in the following words: To regulate commerce with the foreign nations, and among the several States, and with the Indian tribes." (Record, pages 3-4.)

And thereupon, the State Court signed an order for removal *ex parte*, removing same to United States Circuit Court for the District of Maryland. (Record, page 5.) And thereupon, the plaintiff in error filed an answer, under oath, in said United States Court, denying the allegations in the petition for removal.

> "The plaintiff in this cause says, in answer to the petition of James M. Waterworth, the defendant * * * He denies that this suit arises under Article 1, section 8, of the Constitution of the United States. He denies that the title to the *locus in quo*, described in the declaration in this cause, is now or has been in the United States of America, and denies that all of the property described in said declaration, is or ever has been submerged land, and charges that a large portion thereof, is a part of the dry land of the grants known as Point Lookout, and 'the Addition to Johnson's Harbor.' He charges that another large portion thereof, is improved by a wharf; and dock and building thereon erected by this plaintiff." (Record, pages 7 and 8.)

The plaintiff in error filed as a part of said answer certain exhibits, showing a good *prima facie* legal title in himself to the *locus in quo*, as the grantee of the State, by the metes, bounds, courses and distances of the grants, and by his deed to said grants, and as the riparian proprietor, (Record, page 8,) and prayed the said Court to remand the cause to the State Court. (Record, page 14.)

The defendant in error, thereupon, disclaimed and refused to defend, as to all of the *locus in quo*, except that portion on which the Hawkins' Point Light House is built.

The plaintiff in error, thereupon, excepted to the jurisdiction of the Court, and moved the lower Court to remand the cause, and made a part of said motion the opinion of Attorney-General A. H. Garland, admitting the title to the site of the Hawkins' Point Light House to be in the plaintiff in error. (Record, pages 27-31.)

Subsequently, the plaintiff filed the following motion:

> "The plaintiff moves to amend, in accordance with section 954, R. S. U. S., his motion filed March 20, 1888, by striking therefrom, so much thereof as is impertinent and irrelevant, and by prefixing thereto, the following words, viz: The plaintiff pleads to the *jurisdiction of this Court, because the grounds upon which the defendant removed this cause from the State Court, are* RES JUDICATA, and do not present a federal question; and further, to amend said motion, by attaching thereto and making a part thereof, his motion filed June 23, 1888."

The lower Court overruled said motions:

> "Ordered by the Court this 4th day of June, 1889, that the motion heretofore made by the plaintiff to remand the above case to the Circuit Court of Anne Arundel county, be and is hereby refused."

The plaintiff in error took five bills of exception. (Record, pages 37-38.)

Assignment of Errors.

1st. Refusal of lower Court to remand cause.

2d. Overruling the demurrer of the plaintiff.

3d. Sustaining the demurrer of the defendant.

Argument.

The lower Court should have remanded the cause to the State Court, because:

1st. The patent from the State of Maryland, conveying the land described therein by metes, bounds, courses and distances, "*together with all rights, profits, benefits and privileges thereunto belonging*" creates a private right and title to the *locus in quo* in the plaintiff in error, the owner of said land, which the stranger, that is to say, the United States, could not take without due process of law, nor for public use without just compensation; and it appears on the face of the Record, there has been no process of law and no compensation, therefore, the question is *res judicata.*

2d. Because it appears on the face of the Record, that the plaintiff in error is the owner of the adjacent fast or dry land, to which, under the decisions of the highest Court of the State of Maryland, and by this Court, are attached riparian rights at common law, which cannot be impaired, injured or destroyed without due process of law; and if taken for public use upon just compensation, and it being admitted on the face of the Record there has been no compensation or process of law, the United States is inhibited by the fifth amendment of the Constitution from impairing, injuring or destroying the said rights, or occupying the *locus in quo* so as to practically take away said valuable rights from the plaintiff in error, therefore the burden of proof is on the defendant to show a title in

the United States, eliminating the said rights of the plaintiff in error, or to show they never existed, otherwise the plaintiff in error is entitled to a remand to the State Court.

3d. Because in controversies between citizens of the same State, claiming lands, where they do not claim under grants from different States, the State Court has jurisdiction, and in suits at common law where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. It being apparent on the face of the record that both parties to this cause, which is a controversy relating to land, are citizens of the same State, and they do not claim under grants from different States, judgment in this cause should be reversed, and the cause remanded to the State Court, because the judicial power of the Federal Court does not extend to entering up a judgment for land in this cause, but is reserved to the State by the provisions of the Constitution itself.

Defendant must show "Outstanding Title beyond Controversy."

The defendant must show on the face of the record, a valid legal title and consequent right of possession to the *locus in quo* in the United States, otherwise the question raised upon the face of the record is "*res judicata*," and the cause must be remanded to the Circuit Court for Anne Arundel County.

> "The rule requiring the plaintiff to show a legal title is gratified by proof of a title *prima facie* good. He is not required to go further than this, but it is then incumbent on the defendant setting up an outstanding title in a stranger, by way of defense, to establish the existence of such title with clearness and precision, and generally it must be a title of such a nature as would

enable such stranger to recover in ejectment against either of the contending parties."

Poe's Pleading, vol. 1st, sec. 261 of revised edition, page 183 of edition in Supreme Court Library.

This rule is laid down by the Court of Appeals of Maryland, in the following cases:

Hall vs. Gittings, 2 H. & J. 125.

George's Creek Coal & Iron Co. vs. Detmold, 1 Md. 238.

Lannay's lessee vs. Wilson, 30 Md. 546.

And the same rule is laid down by this Court in the case of Greenleaf's lessee vs. Birth, 6 Peters, 312.

The Act of 1852, chap. 177, sec. 2, embodied in the Code of Maryland, provides that:

"In all actions at law where the title to land is a question, it shall not be necessary for any party to any such action to prove the lands in controversy have been patented; but a patent shall in all cases be presumed in favor of the party showing a title otherwise good."

This Court has laid down the rule in the case of Greenleaf's lessee vs. Birth, 6 Peters, 312, in which Mr. Justice Story delivered the opinion of the Court, as follows:

"The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder by setting up a title in a third person, with whom he has no privity. In such a case it is incumbent upon the party setting up the defense to establish the existence of such an outstanding title beyond controversy. * * * If he leaves it in doubt, that is enough for the plaintiff. He has a right to stand upon his *prima facie* good title, and he is not bound to furnish any evidence to assist the defense. It is not incumbent on him regularly to establish the non-existence

of such an outstanding title; it is the duty of the defendant to make its existence certain."

The question raised on the face of the record is, does the defendant in error show such an outstanding legal title in the stranger, that is, in the United States, by reason of the Constitution of the United States, as to constitute a valid defense. If the defendant does not show that the United States acquired under the Constitution of the United States, the exclusive title to the land described in the patent set up in the replication of the plaintiff in error, then there is no such outstanding title in the United States as will prevent the recovery of the plaintiff in error against the defendant in error. If the plaintiff in error is entitled to recover against the defendant in error, then this cause does not arise in the Constitution of the United States.

I.

Patents for Submerged Land.

A consideration of the Constitution itself, and the cases determined by this Court and the Court of Appeals of Maryland, make it evident that there *is no color of title outstanding* in the United States, to land described in the patent filed by the plaintiff in error, as a part of his answer, in which he prayed for a removal of the case, (Record, page 14,) and subsequently set up by the plaintiff in error, in his replication to the amended second plea of the defendant in error. (Record, pages 32-33.)

The first question is, could the United States have issued a patent for this land, either to an individual or to any of its corporations; has not this Court decided in every case where it has been called upon to determine a similar question, that the United States could not make a grant for submerged land. If the United States could not make such a grant for this land, where is there any color of title to this land in the United States? It is

axiomatic, the United States can grant any land to which it has a valid legal title. If it has not a valid legal title, on what grounds could the United States recover this land in an action of ejectment against the plaintiff in error? If the United States could not recover in such an action against the plaintiff, by what right does it hold the possession?

The case of Pollard's lessee vs. Hagan, 3 Howard, 212, and the other case cited in the briefs filed by the plaintiff in error, settle beyond controversy the fact that the United States could not make a grant for this *locus in quo*.

If the United States could not make a grant for the land, it could not make a grant for an easement in it to an individual of any of its corporations, and if it could not grant such an easement it can not appropriate one for its own use. The occupation of the land by the light house structure is an appropriation of the land itself, the transmission of the rays of light across a certain given strip of land which must be kept clear of all buildings, is an occupation of that strip constituting an easement.

> "It seems that an adverse right by the United States to send rays from a light house across a private close, is an easement which is to be gained in usual way, *i. e.*, by grant, express or implied, from the owner of the close."
>
> 16th Opinions Attorney General, 632.

The plaintiff in error is not seeking to recover the water but the land described in the metes, bounds, courses and distances of his patent.

> "But the land which that water covers is permanent, fixed and immovable, and, therefore, in this I may have a certain substantial property."
>
> Blackstone, Vol. 1, book 2, chap. 2d, page 17, Sharswood Edition.

The rights of plaintiff in error under his patent are not affected by this restriction in the Act of 1862, chap. 129:

> "But no such improvement shall be made as to interfere with the navigation of the stream of water into which the said improvement is made."

The Court of Appeals has rendered a decision flatly on this point, and the case is cited on page 3, line 15 of the supplemental brief filed by the plaintiff in error *in propria persona*, May 9th, 1894, in this case.

> "It has been made a question in this case, whether the patent for Linthicum's Comet, did not take away from the riparian owner the right to such accretions as we have been considering. *As it was issued before the passage of the Act of* 1862, *chap.* 129, *it is of course not affected by this Statute.*"
>
> Coan vs. Linthicum, 64 Md. 439; see page 452.

When it is a self-evident proposition, the United States acquired no power under the Constitution to make a grant for such a patent, that it could not grant either the land itself or any easement therein to any of its corporations, then this power is reserved to the State by the express terms of the IX and X amendments to the Constitution.

It is evident that the United States could not make such a grant to a stranger, and thus intercept the rights of a riparian proprietor, because the power was "not delegated to the United States by the Constitution." But the State can do it, because the power was reserved to the States by the Constitution.

If the United States has not the power to intercept the rights of the riparian proprietor, by making such a grant, where is the power to intercept them at all? And even if the United States had received power under the Constitu-

tion to make such a grant, or to intercept the rights of the riparian proprietor in any other manner whatsoever, to what limitation is that power made subject by the terms of the Constitution itself? By the limitation imposed by the fifth amendment, which provides: "Nor be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation."

But there was no such inhibition imposed by the Constitution upon the States, until the adoption of the 14th amendment, July 21st, 1868.

No State since the adoption of the 14th amendment to the Constitution could intercept the rights of a riparian proprietor; therefore the deed from the Governor of Maryland to the United States would have been invalid even if there had been no prior grant. This rule is laid down in the Lake Front case, the city of Chicago being the riparian proprietor. The granting act for the submerged grant was repugnant to the 14th amendment, because the granting act should never have been passed. The entire jurisdiction of this Court in that case rests upon the question of the repugnancy of the Acts of the State of Illinois to the 14th amendment.

Why is not the 5th amendment as forcible an inhibition on the United States as the 14th amendment is on the State? Both amendments provide that no person shall be deprived of property without due process of law. Can it be contended that a grant for the 133 acres described in the patent of the plaintiff, is not property? If the United States can take, without due process of law, that portion of the grant which is occupied by the site of the Hawkins' Point Light House and the strip occupied and required by the transmission of the light, it must be evident that it can take the whole of the 133 acres described by the metes and bounds of the patent. Can it be contended that it can take this property by an express Act of Con-

gress, without just compensation? Would that be due process of law, when the Constitution, the supreme law of the land, provides there must be just compensation? The United States has passed no such Act; the Act merely appropriating money is not even a color of authority.

> "To amount to an exercise of this national right of eminent domain might require some unequivocal expression of such a purpose, like a law expressly authorizing the placing of range lights at Saginaw river, *and not the mere passage of an Act to appropriate a certain sum for the improvement of that river*, which it was proposed thus to expend."
>
> 15th Opinions of Attorney General, 50.

But if it had passed an express Act, would that not be a repetition of what Congress did in the case of the Monongahela Navigation Co.? In that case it not only passed an express Act, but it provided in the Act for the payment of $160,000 for the dam. But this Court held that amount was not *just* compensation. If Congress cannot appropriate property in a navigable stream, by an express Act, in which it makes some compensation, it certainly cannot appropriate such property by an Act in which it provides for no compensation whatever.

An exclusive or several right of fishing, may be granted to an individual, even in the arms of the sea.

Angell on Water Courses, sec. 65, page 71.
Jacobsen vs. Fountain et al, 2 John. Rep. 170.
Gold vs. Jones, 6 Cowan, 399.
Rogers vs. Jones, 1 Wendell, 237.
Hale de Jure Maris, chap. 5, pages 18, 19.
Mayor and Commonalty of Oxford vs. Richardson, 5 Term Rep. 439.
The Duke of Somerset vs. Fagnell, 4 Barn. & Cres. 875.

The language in the patent from the State to the plaintiff in error, "together with all rights, profits, benefits and privileges thereunto belonging," is precise and positive enough to convey a several fishery therein.

The most recent case on the question of tidal lands, the case of Lowndes vs. Huntington, reported in 153 U. S. 1, in which Mr. Justice Brewer delivered the opinion of the Court, establishes beyond the possibility of a doubt the private nature and title of the plaintiff in error to the land described in this patent. This case, the latest decision on this subject, is directly on this point, and seems to settle the question raised in this case beyond peradventure, for it is a self-evident proposition that if the plaintiff in the Huntington case was entitled to possession of the submerged land in controversy in that case, the plaintiff in this cause is entitled to the possession of the land in controversy here; and if he is entitled to the possession, the United States is inhibited by the Constitution from disturbing his possession, except by due process of law and upon just compensation.

> "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it, no, not even for the general good of the whole community."
>
> Blackstone, Book 1, chap. 1, page 137, Sharswood edition.

violation

II.

Riparian Rights.

This Court has laid down the rule that riparian rights exist at common law, and the plaintiff in error claims that the defendant in error must show there existed no riparian rights in the *locus in quo* at the time the Constitution of the United States was adopted, in order to show a valid outstanding title in the United States, under the rules of pleadings cited *supra*.

The case of The Potomac Steamboat Co. vs. Upper Pot. S. Co., 109 U. S. 675, in which Mr. Justice Matthews delivered the opinion of the Court, lays down the rule that all the riparian rights along the Potomac river, on Water street in Washington city, were rights at common law.

On page 686, the Court says:

> "Undoubtedly Notly Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses, and to the exclusion of all the world besides."

On page 698:

> "Enough has been said to show that the rights of the parties respectively stand upon the legal effect of the original documents of title. According to them, as we have shown, and now decide, the riparian rights claimed by the appellants, which originally were appurtenant to the land of Notly Young, by virtue of its adjoining the Potomac river, passed to the United States by the conveyance which vested in them the ownership of the land on which Water street was laid out and has been built."

This case affirms Dutton et al. vs. Strong et al., 1 Black.

The Lake Front case lays down the rule as to the point to which the riparian proprietor may extend his piers and wharves.

The Law of Maryland.

The same rule is laid down by the Court of Appeal of Maryland:

"In Maryland the owner of land bounded by tide water is authorized, according to statutes beginning in 1745, to build wharves and other improvements upon the flats in front of his property, and to acquire a right in the land so improved."

152 U. S. 23, Mr. Justice Gray.

The case of B. & O. R. R. vs. Chase, 43d Md. 364, goes even further than this. It lays down the rule that the riparian rights existed at common law; and where, owing to the angular formation of the shore, these rights conflict, they attach to that portion of the water front which is held under the senior grant. The recent case of Horner vs. Pleasants, 66 Md. 475, affirms Chase's case. If these rights existed, either by common law or by statute, at the time the Constitution was adopted, it is evident that the United States did not acquire any right under the Constitution to intercept, injure, impair or diminish them, except as provided in the 5th amendment, which is an inhibition on the United States, but not on the States, and the burden of proof is on the defendant to show they did not exist.

"Every nation acquiring territory by treaty or otherwise, must hold it subject to the Constitution and law of its own government, and not according to that of the government ceding it."

Pollard's Lessee vs. Hogan, 3 Howard, 225.

III.

The case of Lee vs. U. S. 215, in which Mr. Justice Miller delivered the opinion of the Court, flatly lays down the rule, that making the State officer a party to the suit does not make the State a party, and that no exigency or necessity for which the use of the property may be required, and no executive authority under which it may

be held, can relieve the United States from the limitations imposed by the 5th amendment.

The case of Pumpelty vs. Green By. Co., 13 Wall. 166, lays down the rule that this amendment applies as well when the property is injured or impaired, as when it is physically taken.

The fact that the transmission of rays over the *locus in quo*, is a taking of the land, is settled by the inquisition of the jury, in the proceeding instituted by William Windom, in the U. S. Court for the condemnation of this easement, over the fast land which adjoins the *locus in quo*.

The decision in the case of Scranton vs. Wheelen, 57 Fed. Rep. 803, follows the decision in the case at bar in the lower Court, and cites it; and it is in direct conflict with the ruling of this Court in the case of United States vs. Jones, 109 U. S. 513, in which Mr. Justice Field delivered the opinion of the Court. The case at bar is a suit at common law, and the plaintiff in error is entitled to a trial by jury in the State Court, after the constitutional questions have been removed.

> "In suits at common law, where the value exceeds twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of common law."
>
> 7th amendment Constitution U. S.

JURISDICTION OF FEDERAL COURTS.

If this cause does not arise in the Constitution of the United States, then the plaintiff in error is entitled to recover in the State Court, because the Constitution of the United States limits the jurisdiction of the Courts of the United States, in controversies relating to land, as follows:

"The judicial power shall extend to all cases in law and equity * * * between citizens of the same State, claiming lands under grants of different States."

Art. 3, section 11.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

9th Amendment to Constitution.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States, respectively, or to the people."

10th Amendment to the Constitution U. S.

That the power of the United States is limited by the Constitution is axiomatic.

It is a self-evident proposition that the lower Court can only enter up a judgment as prescribed by the laws of the United States and the State. If it is held by this Court that the judicial power of the Federal Court extends to this cause, judgment should be entered up for the plaintiff as to all that part of the *locus in quo* to which the defendant in error refused to defend.

Section 914 of the Revised Statutes of U. S. requires all proceedings in actions at common law to follow the law of the State. The plaintiff in error is entitled, under this section of the Revised Statutes, to have a judgment in this case in accordance with rules of established law, and not in a novel and unprecedented way. (See law of Maryland quoted in original brief of plaintiff in error.)

The rule is laid by this Court, that on demurrer no bill of exception is necessary, and that the Court will examine the whole record. This is also the law of Maryland.

Poe, Vol 1st, sec 706, and cases cited.

"It is a mistake, however, to suppose that in such cases the writ of error operates only on the bill of exceptions. Such is never the fact, unless the whole record is set forth in the bill of exceptions; as the operation of the writ of error addresses itself to the record as an entirety, and not to any separate portion of it as distinct from the residue; and when the cause is removed into the appellate Court, any error apparent in any part of the record is within the revisory power of such tribunal."

Snydan vs. Williamson, et al., 20 Howard, 433, Mr. Justice Clifford.

SUMMARY.

It is a notorious fact to this Court that piers are extended into the rivers and sea in England. At Ryde on the Isle of Wight, a pier several thousand feet in length extends into the sea, for the landing of passengers and freight. It is a self-evident proposition, and the rule has been laid down judicially, that an Act of Parliament, when it receives the assent of the Crown and becomes a law, is the supreme law. Parliament is not subject to judicial control, and there is no written Constitution in England by which an Act of Parliament can be declared invalid and unconstitutional. It must, therefore, be apparent beyond controversy that if Parliament passes an act making a grant in the sea, together with all rights, profits, benefits and privileges thereunto belonging, it will create a *jus privatum* in that grant, and no man in England can question the validity of the grant, because under the rule laid down in Blackstone, every man in England is considered to be present at the passage of the Act in the person of his representative, so that the grant of Parliament is the grant of the people, and every man is estopped by his own grant. (See supplemental brief of plaintiff in error, filed May 9th, 1894, on question of estoppel.)

The *jure prerogativæ* may be curtailed, and the common law may be altered by statute.

"Where the common law and a statute differ, the common law gives place to the statute."
Blackstone, section 7, introduction, page 88, Sharwood edition.

A grant by the State is likewise a grant by the people, and if the grant conveys by its terms a fee simple, it carries with it all the incidents of that estate, and no man can deny its validity, because it is his own grant. The grant of the plaintiff in error being a grant of the fee, "together with all *rights, profits, benefits and privileges thereunto belonging,*" is an absolute estate, with all the incidents thereof, the principal one of which is the right of possession.

153 U. S. 1, Mr. Justice Brewer, *supra.*

The fact that the United States could not issue a patent, or make a grant for any easement in the *locus in quo* to an individual or a corporation, shows conclusively that it cannot appropriate it for public use except by due process of law. The Constitution, being the supreme law of the land, prescribes of what due process of law consists. It consists in making due compensation, and a trial of the facts at issue in a suit at common law by a jury.

VII amendment to the Constitution U. S.

This rule applies as well to cases in which the United States are concerned as to individuals.

The same reasoning which applies to the title under the patent applies to the riparian rights which existed at the time the Constitution was adopted, and which cannot be diminished or impaired, or taken by the United States, except in the way prescribed by the Constitution. (Jones vs. U. S., Lee vs. U. S., Yates vs. Milwaukee, *supra.*)

The patent was issued May 15, 1668, for the fast land, "*together with all rights, profits and benefits thereunto belonging.*"

The defendant in error must establish on the face of the Record, such an outstanding title in the United States to the *locus in quo*, as would be sufficient to enable this third party to maintain an action of ejectment against both of the parties to this cause. Unless he does this, the cause does *not arise* in the *Constitution* or *any* law of the United States.

The right of removal in this cause does not depend on language of any of the removal acts; the question is, does the Constitution itself extend the judicial power of the United States to this cause, any further than the determination of the questions involving the construction of the Constitution? that the Court has jurisdiction to determine these questions is of course conceded, because they are involved in the refusal of the lower Court to remand.

It is respectfully submitted, the plaintiff in error is entitled to recover his costs, because he recovered part of the land the defendant claimed in his original 2d plea.

> "The plaintiff in ejectment may recover less than he claims, provided it be of the same nature with that claimed."
>
> Poe, Vol. 1st, sec. 271.

It is prayed that the Court will reverse the judgment of the lower Federal Court, and remand the cause to the Circuit Court for Anne Arundel county, State of Maryland; but if this Court affirms the judgment of the lower Court for the defendant, as to the land which he defended, then it is prayed this Court will remand the cause with instructions to the lower Court to enter up judgment for the plaintiff in error for all of the remander of the *locus in quo*, described in the declaration.

THOMAS C. CHAPPELL,

Plaintiff in Error and Solicitor in Person.

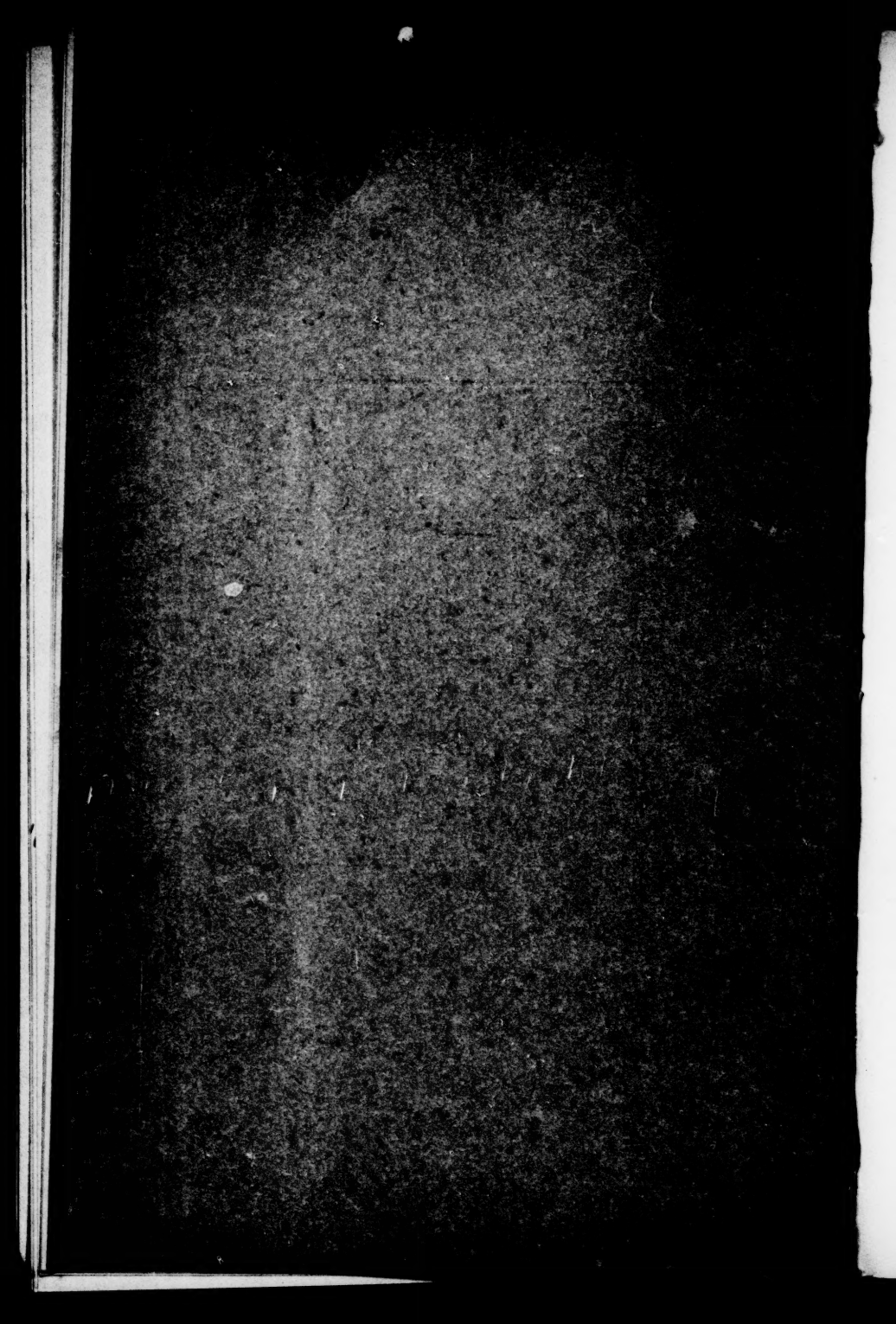
In the Supreme Court of the United States

OCTOBER TERM, 1894.

THOMAS C. CHAPPELL
v.
JAMES M. WATERWORTH. } No. 14.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF [illegible]

BRIEF FOR THE DEFENDANT IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS C. CHAPPELL
v.
JAMES M. WATERWORTH. } No. 16.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES ON THE QUESTION OF FEDERAL JURISDICTION.

If this is a suit "arising under the Constitution or laws of the United States," it might, by the express terms of section 1 of the act of March 3, 1887 (c. 373, 24 Stat., p. 552), as corrected by the act of August 13, 1888 (c. 866, 25 Stat., 434), have been brought originally in the circuit court of the United States, and, if so, was removable by the defendant, under section 2 of that act, from the State court into the Federal court; for, as was held in *Tennessee* v. *Planters' Bank* (152 U. S., 454), the

Federal courts are given jurisdiction by removal under section 2 of all cases of which they are given original jurisdiction by section 1.

The question, therefore, is simply whether the suit is one "arising under the Constitution or laws of the United States." It is an action brought against a person who is, and at the commencement of the action was, an officer and agent of the United States, to recover from him the possession of property claimed to be owned by the United States which he holds not otherwise than as their agent and on their behalf.

That makes it, I submit, a suit which arises under the Constitution and laws of the United States. *Texas and Pacific Railway Co.* v. *Cox* (145 U. S., 593) was a case in which the court held that a suit for damages against receivers appointed by a circuit court of the United States might be brought in the Federal court, although no question of a Federal nature was involved, upon the ground that the receivers, in executing their duties, were acting under the judicial authority derived from the Constitution of the United States, and that the case was therefore one arising under the Constitution. The same is true of the case at bar.

It is not a case such as was mentioned by Mr. Justice Miller in *Railroad Company* v. *Mississippi* (102 U. S., 135, 144), and referred to by Mr. Justice Gray in *Tennessee* v. *Union and Planters' Bank* (152 U. S., 454, 462), where "the cause of action depended solely on the law of the State," and "the act of Congress only came in question incidentally as part, it might be a very small part, of

the defendant's plea in avoidance;" nor a case such as was referred to by Mr. Justice Harlan in *Metcalf* v. *Watertown* (128 U. S., 586, 589), and mentioned by Mr. Justice Gray in 152 U. S., 461, which the court may be called upon "to retain in order to see whether the defendant may not raise some question of a Federal nature, upon which the right of recovery will finally depend."

It is not a case against a defendant who may or may not, at his option, and as a personal privilege, set up some immunity under the Constitution or laws of the United States. It is a case in which the defendant, on the one hand, has no right, title, or interest to defend except what he holds as an officer and agent of the United States, and in which the plaintiff, on the other hand, has no right of recovery and seeks to enforce none except against the United States, who alone are in possession (in the only way in which they can possess anything, to wit, by their agent), and who alone deny the plaintiff's right. In other words, the plaintiff has no controversy in fact except with the United States. And, while the defendant, although an officer and agent of the United States has no immunity from suit on that account (*United States* v. *Lee*, 106 U. S., 196), the lawfulness of his possession *as such agent*, and *the right and title of the United States* to the property are the very subject-matter, and the only subject-matter, of inquiry in the case.

The fact that the plaintiff does not disclose in his declaration that the defendant is an officer of the United States, and that the possession which is sought to be recovered is in fact the possession of the United States,

held by the defendant as their officer and agent, does not make the case any less one "arising under the Constitution and laws of the United States;" for, as was said by Chief Justice Marshall in *Osborne* v. *Bank of United States* (9 Wheat., 738, 824), "the questions which the case involved then [at that time, *i. e.*, when the action is brought] must determine its character, whether those questions be made in the cause or not."

The case of *Tennessee* v. *Bank of Commerce* (152 U. S., 454), which was wrongly removed from the State court into the Federal court, was an action by the State of Tennessee to recover a tax levied under the laws of that State. The defendant was at liberty, at its option, to defend against the tax upon the ground that it was in contravention of the Constitution or laws of the United States. Whether the case would ever present any question under the Constitution or laws of the United States depended altogether upon the election of the defendant to set up an immunity thereunder as its personal privilege. But at bar the action is against an officer of the United States, who has no privilege or duty except to answer that the possession which he holds and of which the plaintiff seeks to deprive him is the possession of the United States.

It is, in fact, a suit to recover the possession of the United States, which can not be held otherwise than through some agent or officer. It is an action against a defendant who exercises his authority and holds his possession under the Constitution and laws of the United States, and not otherwise, and upon the principle of *Texas and Pacific Railway* v. *Cox* (145 U. S., 593), is therefore

a suit "arising under the Constitution and laws of the United States," which might have been brought originally in the circuit court of the United States, and which was therefore properly removed by the defendant into that court.

Respectfully submitted.

LAWRENCE MAXWELL,
Solicitor-General.